88-856

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

PETER CHEMA,

Petitioner,

v.

UNITED STATES OF AMERICA and YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Respondents.

Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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EXHIBIT A—Order of United States District Court for the Southern District of New York, Dated July 26, 1988.

(31)

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH—NAACP, *et al.*,

Plaintiffs-Intervenors,

v.

YONKERS BOARD OF EDUCATION, *et al.*,

Defendants.

80 CIV 6761 (LBS)

ORDER

Part VI of this Court's May 26, 1986 Housing Remedy Order required the City of Yonkers to submit, by November 15, 1986,

a Long Term Plan for affordable housing units. It is beyond dispute that the City has defaulted on this obligation. Specifically, the City of Yonkers refused to submit such a plan on November 15, 1986. Furthermore, despite its agreement in the January 28, 1988 First Remedial Consent Decree in Equity to adopt no "later than 90 days after entry of [the January 28, 1988 decree]" a legislative package of incentives for developers to encourage development of 800 units of affordable housing, and this Court's entry of the Long Term Plan Order on June 13, 1988, the City has failed and refused to enact such legislation. On June 28, 1988, the City Council defeated a Resolution stating that the City would enact such legislation. In its Memorandum (32) filed on July 11, 1988, the City further stated that "the City has indicated by the defeat of the Resolution . . . that it will not voluntarily adopt the legislation contemplated by [the Long Term Plan] Order." City of Yonkers Memorandum of Law in Opposition to Plaintiffs, Proposed Order, p. 4. This Court will tolerate no further violation of its lawful orders and accordingly enters this Order.

1. The City of Yonkers is hereby ORDERED to enact, on or before August 1, 1988, the legislative package relating to the long-term plan as described in Section 17 of the First Remedial Consent Decree in Equity dated January 28, 1988 and the Long-Term Plan Order dated June 13, 1988.

2. It is further ORDERED that, in the event the City of Yonkers fails to enact the legislative package on or before August 1, 1988, the City of Yonkers shall be required to show cause at a hearing before this Court at 10:00 a.m. on August 2, 1988, why it should not be held in contempt, and each individual City Council member shall be required to show cause at a hearing before this Court at 10:00 a.m. on August 2, 1988, why he should not be held in contempt.

3. It is further ORDERED that, if the necessary legislation is not passed on or before August 1, 1988, and the City cannot demonstrate why it should not be held in contempt, beginning on August 2, 1988, the City shall be subject to daily fines until

such time as the City has purged itself from contempt by enacting the legislation. The City's fine shall be $100 for (33) the first day and the daily rate shall be doubled for each consecutive day of non-compliance. Said fine shall be payable by a check drawn to the "Clerk, Southern District of New York" and the City Manager shall cause said check to be delivered to the Clerk of the Court no later than 4:30 p.m. on each day that the Clerk's Office is open and shall be drawn for the amount of the fine incurred for the previous day. The check to be delivered on a Monday or day after a holiday shall include all fines incurred with respect to the days on which the Clerk's Office was not open. The proceeds of said checks shall be paid into the Treasury of the United States for general purposes and shall not be ear-marked, escrowed, or otherwise allowed for any special purpose or fund. Fines paid Pursuant to this Order shall not be refunded even in the event that the City eventually ceases its contumacious conduct.

4. It is further ORDERED that, if the necessary legislation is not passed on or before August 1, each of the Council members who fails to vote in favor of enactment of such legislation, and has not demonstrated why he should not be held in contempt, shall be personally fined $500 per day every day (but not doubling) until such time as such individual has purged himself from contempt as described below or the City has enacted the legislation. Said fine shall be payable by a check drawn to the "Clerk, Southern District of New York" and shall be delivered to the Clerk of the Court no later than 4:30 p.m. on each day that the Clerk's Office is open and shall be drawn for the amount (34) of the fine incurred for the previous day. The check to be delivered on a Monday or day after a holiday shall include all fines incurred with respect to the days on which the Clerk's Office was not open. The proceeds of said checks shall be paid into the Treasury of the United States for general purposes and shall not be ear-marked, escrowed, or otherwise allowed for any special purpose or fund. Fines paid pursuant to this Order shall not be refunded even in the event that an individual ceases its contumacious conduct. Fines imposed by this paragraph shall be paid personally by each indi-

vidual Council member and under no circumstances shall any City funds be used or appropriated for such purpose. An individual may purge himself by voting to enact the necessary legislation. However, if the legislation is not passed and on any subsequent vote such individual again fails to vote in favor of the legislation, he or she shall once again be personally fined $500 per day until such time as such individual has once again voted in favor of the legislation or the City has enacted the legislation.

5. It is further ORDERED that, if the necessary legislation is not enacted by on or before August 10, 1988, any Council member who then remains in contempt shall be committed on August 11, 1988 to the custody of the United Stated Marshall for imprisonment until such time as the City has enacted the legislation or such member has purged himself from contempt as provided in paragraph 4. The fines described in paragraph 4 shall continue during any time of imprisonment.

(35) 6. It is further ORDERED that the Mayor of Yonkers shall convene a special session of the City Council for the purpose of voting on the legislative package at least once a week beginning on August 1, 1988, or more frequently if so requested by any Council member. Any Council member who is imprisoned pursuant to paragraph 5 above shall be released for the purpose of attending such meetings and for no other purpose.

7. It is further ORDERED that the City shall forthwith deliver a copy of this Order to the New York State Emergency Finacial Control Board for the City of Yonkers.

8. It is further ORDERED that the Mayor of the City of Yonkers shall by August 1, 1988 post in a conspicuous place in all public buildings a copy of this Order together with the following notice:

All employees of the City of Yonkers are hereby put on notice that failure to comply with, or interference with implementation of, the court order attached herewith may subject any employee of the City of Yonkers to personal contempt sanctions imposed by the court.

It is so ORDERED, this 26 day of July, 1988.

LEONARD B. SAND
United States District Judge

EXHIBIT B—Letter From Hon. Leonard B. Sand, U. S. District Judge, to All Counsel, Dated July 28, 1988.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
New York, New York 10007

July 28, 1988

Re: *U.S.A. v. Yonkers, et al.*,

TO ALL COUNSEL:

With respect to this Court's Order of July 26th, 1988, that specific Order of the Court will be satisfied if the City Council, on or before August 1st, adopts a resolution committing itself to enact the Affordable Housing Ordinance within the minimum time prescribed for notice pursuant to state law.

Regardless of what action the City Council does or does not take on or before August 1st, counsel for all parties are to appear before the Court on Tuesday, August 2nd, at 10:00 A.M.

At such time, if called upon, they are to be prepared to state their views with respect to the enclosed proposed Order.

Very truly yours,

LEONARD B. SAND,
United States District Judge

EXHIBIT C—Transcript of Hearing Held August 2, 1988.

(143)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

and

YONKERS BRANCH NAACP, *et al.*,

Plaintiff Intervenor

against

YONKERS BOARD OF EDUCATION, CITY OF YONKERS, AND YONKERS COMMUNITY DEVELOPMENT AGENCY

80 Civ 6761 LBS

Defendants

August 2, 1988
10:00 a.m.

The Court: I have attempted unsuccessfully to obtain a larger courtroom for these proceedings and I understand there are people outside who cannot be allowed in because we are

filled to capacity. I regret that. There are many other matters that are taking place in this courthouse today.

This court entered an order on July 26th which among other things ordered the City of Yonkers to take certain action on or before August 1st and provided that if that action were not taken, this hearing would be held to show cause why the City of Yonkers should not be held in (144) contempt and each individual city council member shall be required to show cause at a hearing before this court at 10 a.m. on August 2nd why he should not be held in contempt.

For the record, Mr. Sculnick, did the city council on or before August lst take the ordered action?

Mr. Sculnick: They took two actions last night.

First a public hearing has been set for August 15th on appropriate notice under state law to have a public hearing, after which the city council would be entitled to vote on the zoning ordinance that has been required under the court's long-term plan order. And with respect to a resolution of intent, to adopt that ordinance, the city council defeated that resolution of intent by a vote of 4 to 3 last night.

The Court: Are there present in the courtroom this morning the four members of the city council who voted against the resolution of intent?

Mr. Sculnick: Yes, there are. In fact all members of the city council are present in the courtroom today.

The Court: Very well.

Mr. Sculnick, I will hear you with respect to why the City of Yonkers should not be held in contempt. You may proceed.

Mr. Sculnick: Your Honor, I am here today (145) representing the municipal corporation of the City of Yonkers not the individual council members. With respect to the City of Yonkers and in that regard, your Honor, when I refer to the City of Yonkers, I mean to refer to the municipal corporation. When I refer to the city council, I will do so specifically.

The city opposes the imposition of fines or other contempt sanctions for three reasons: First the city has urged for at least the last three or four weeks that this is unnecessary and regretable confrontation between the federal court and the city council. The city urged back in July, at the hearing date on July

12th I believe, the return date for the joint motion by the NAACP and the government for the proposed order that was proposed by them on July 5th.

The Court: But the city offered no affirmative proposal?

Mr. Sculnick: That is not true. The city suggested that the court could order the adoption of the zoning ordinance just as it had entered orders for the housing remedy order in May of 1986, just as it had entered the long-term plan order in June of 1988.

The Court: The city's sole proposal was that the city do nothing, but that the court and the court alone act. Is that accurate?

(146) Mr. Sculnick: With respect to the adoption of the zoning ordinance, that is correct. After the city council had failed to adopt the resolution of June 28th that had been suggested by this court, that was the suggestion made by the city.

As a result of the court's decision to enter the July 26th order which is the basis for the hearing today, that order sets forth should the city council fail to adopt the zoning ordinance, fines would commence against the City of Yonkers in the amount of $100 per day for the first day doubling each day thereafter.

The city submits that fines of that magnitude are devastating and will bankrupt the city within a matter of approximately three weeks probably effectively sooner than that. In addition, we have been notified by Moody's Investor Service, one of the bond rating agencies, they issued a credit report on July 29th which indicates that depending on the outcome of last night's vote and the outcome of any proceedings today, that they would take "appropriate action" with respect to the city' bond rating.

We believe that in reference to appropriate action means either the suspension of the city's bond rating or actually lowering the city's bond rating, which is B-AA, which is the lowest investment grade under the Moody's rating system. Any lowering of that bond rating or (147) the suspension thereof would completely preclude the city from access to the capital markets.

That would have extraordinarily negative consequences for at least two reasons: First of all, it would prevent the city from carrying forward any existing capital projects. It would in-

crease the cost of any other borrowing; and lastly, your Honor, and I would urge the court give serious consideration of this matter, it would effectively preclude the city from financing any other aspects of this court's remedial order including the two new schools.

With regard to the punitive nature of the fines, your Honor, the city urges that they are punitive rather than remedial in that they do not necessarily induce compliance.

The Court: What could be more remedial and less punitive than a fine schedule that begins at $100 a day? $100 for the first day is not going to bankrupt Yonkers. $200 for the second day isn't going to bankrupt Yonkers. The dire picture that you paint supposes: A that the contempt continues; and B that no other agency intervenes. As I have said on a number of occasions, this court is not the only entity which is bound by oath to protect and defend the constitution.

Mr. Sculnick: Your Honor, may I respond to (148) those comments?

The Court: Yes.

Mr. Sculnick: First of all, I just want to make it clear that no other group other than the city council can vote to bring the city into compliance. In other words, the nature of the act which the city has been directed to take is to amend the zoning ordinance.

The Court: But there are measures which can be taken by institutions other than the federal court to comply compliance. The governor, for example, under the Yonkers City Charter, the governor has the right to remove any elected official who engages in improper conduct.

Mr. Sculnick: That is correct. And just last week, your Honor, in an attsmpt by the city manager to induce the city council to comply with the court's orders, the city manager wrote a telegram to the governor seeking the governor's assistance and good office in trying to encourage the city council to pass the resolution on the agenda last night.

The governor's office responded saying that it hoped that the city council would pass the legislation, and, therefore, deemed any action at this point premature.

The Court: What I am trying to say—

Mr. Sculnick: That the city manager in this administration has taken good faith steps within their (149) power to achieve compliance with the court order.

The Court: The city manager is not the person who is subject to this order. His good faith is not an issue.

Mr. Sculnick: He is the chief administrative officer of the city, and I put on the record and before this court's consideration that he has taken efforts to comply with the order; and, therefore, given the efforts by the city's administration to comply, I urge that imposing fines against the city would be unfair and unnscessary and in the respects that I have previously indicated punitive.

The Court: I would like to know a little more if I may about the communication to the governor. Was that in the nature of a request that he use his good offices or was that a request that he exercise powers and responsibilities that he has as the governor of the state under the circumstancs which now obtain?

Mr. Sculnick: Your Honor, I don't have that with me, but I believe it is the former. The governor would be requested to use his good offices, not the latter.

The Court: This is for the record because I understand copies of the Yonkers Charter are difficult to come by.

Mr. Sculnick: I am aware of that.

The Court: It took some time for you to produce (150) a copy. Section C 2-5: Removal from office. Any election officer . . . may be removed from office for misconduct or malversation in office by the governor in the same manner as sheriffs."

You may continue. You were saying punitive nature, and I was responding that the form of the fines was very intentionally drafted to be remedial and not punitive. That is the reason why they start at the very modest level, simply to put everyone on notice as to what will inevitably occur unless there is either compliance or the intervention of some supervening authority.

Now, you are urging that the federal court adopt the ordinance and do that which it is the responsibility of the city council to do. There are a number of difficulties with that. One is

that the federal court should act only when it is satisfied that there is no responsible state or local authority that will act.

The second reason is perhaps philosophical or symbolic and that is there does have to come a moment of truth, a moment of reckoning, a moment when the City of Yonkers seeks not to become the national symbol of defiance to civil rights and to heap shame upon shame upon itself, but to recognize its obligation to conform to the laws of the land and not step by step, order by order, but in the way in which any responsible community concerned about the (151) welfare of its citizens functions. That is not going to be accomplished by this court adopting the ordinance.

Now, it was probably two years ago that I suggested to the city council that if it could not discharge its responsibilities, it could delegate those responsibilities. Those were in the days when we heard that Yonkers was suffering from political paralysis because half of the city council people were running against the other half of the city council people. Those days are gone.

The delegation suggestion then resulted in the appointment of the outside advisor . I recently suggested a commission. The commission can originate not only by an order or this court, but can originate from the city council itself.

It has chosen to do none of these things. It is simply saying no. And that is a very distressing circumstance. What is very peculiar here is if one landed from Mars and came to this courtroom at this stage of the proceedings, it would be very difficult to understand what is happening.

What is most perplexing about this is that in the whole history of this litigation, these eight years, all of the controversy over the schools and all of the controversy over the 200 units of public housing, the least controversial issue seemed to be the affordable (152) housing ordinance. The text of that ordinance was drafted by experts for the City of Yonkers, the provisions in that ordinance for the most part embodying matters which were agreed upon during that brief euphoric period of consensus.

But perhaps it is the realization that the affordable housing ordinance presents the most realistic and greatest opportunity

for accomplishing the remedial purpose of this order which causes this to be the issue which the city council puts itself in the position in which it finds itself this morning.

Mr. Sculnick: Your Honor, may I respond to some of your comments?

The Court: Please do.

Mr. Sculnick: The first issue that you raised is that the federal court should act only when there is no responsible state or local authority that will act. In this case only the City of Yonkers is a defendant. So I think it is taking a comity a bit too far to say if other responsible state authorities fail to act. I think that is putting an unfair burden on the state's responsibilities.

The Court: Unfair burden on the state to have a responsibility when a city of almost 200,000 people totters on the brink of bankruptcy, makes itself a symbol of defiance to a federal court, acts in a manner which is so devastatingly adverse to the interests of its citizens?

(153) It is too much to ask of state officials that they respond to that type of an emergency?

Mr. Skulnick: I think it is one thing to say that they should be invited to participate. It is another thing to say that the court should refrain from taking action which it is empowered to take awaiting the state taking their steps.

My only point is that I don't think that the principal you have enunciated should prevent this court from taking the steps that the city urges, that is, the promulgation or the zoning ordinance.

The Court: We get into a Alfonse Gaston—if I can use that inappropriate reference between—this court and the Emergency Financial Control Board which I know is carefully monitoring this case and has its representative present at all times. The Emergency Financial Control Board awaits this court's action. This court awaits the Emergency Financial Control Board's action and nothing happens.

When the City of Yonkers made an application to this court and said, "we will consent to the entry of a judgment against us for $29 million not to build 200 units of public housing we had agreed to build in 1980 and which would be built with

"federal funds", when the City of Yonkers took that position, it is clear that it crossed the (154) line of any form of fiscal or other governmental responsibility.

So what we are confronted with, and I don't fault the city manager, what we are confronted here with really is a total breakdown in any sense of responsibility.

What we have here is competition to see who can attract the greatest notoriety, who will be the political martyr and without regard to what is in the best interests of the City of Yonkers.

Mr. Sculnick: And that is exactly why, your Honor, we urge the court not to take the steps which would give the counsel members who chose to vote no that notoriety.

The Court: Has the City of Yonkers made an application to the Emergency Financial Control Board? Has any representative of the City of Yonkers said, "We cannot govern the City of Yonkers in a fiscally responsible fashion, step in. We welcome you to do so"?

Mr. Sculnick: No, and I don't think that can be expected of a government. How can any government advocate—

The Court: Harry Truman said, "If you can't take the heat, get out of the kitchen." If the city council can't function, then it should acknowledge the fact that it can't function. If it can't follow federal law, lawful federal court decrees, and if it can't function in that (155) fashion, then it is a nonfunctioning entity. And at least it should have the responsibility to acknowledge its own inability.

Mr. Sculnick: Your Honor, I guess we have debated civic issues before, but I think that would quite frankly be the last thing in my opinion that the city council would do: To vote to go out of existence on this kind of issue. I think that is unrealistic.

The Court: You think it is unrealistic for the city council to say, "We are at an impass. We are at a point where unless some other action is taken, Yonkers will be bankrupt. It will lack the ability to borrow money essential to the functioning of any community. It will involve a massive curtailment of all forms of public service. This we cannot permit to happen; therefore, let us recognize that we can't function. Let us establish a commission. Let us delegate to the commission. Us, the

city council, by our act, not an act imposed upon us by a federal court. We, by our own act, create the commission and we bind ourselves to adopt and comply with its determination"?

Mr. Sculnick: Perhaps that question is best asked of the council members.

The Court: Yes. Is there anytning further you wish to tell me why the City of Yonkers should not be held (156) in contempt and why the court should not impose upon it the fines and sanctions contained in the July 26th Order?

Mr. Sculnick: I think in summation, your Honor, the imposition of the fines proposed in the court's order would have the effect of severely damaging the city's financial posture, but it would be to the detriment of every Yonkers citizen. And in that respect and in that respect in particular, we urge that in effect it punishes the innocent, that it doesn't necessarily coerce compliance by the council members, but it would injure all citizens of Yonkers.

And as a result, we respectfully request the court refrain from imposing fines against the city and not follow through on that proposal. Thank you.

The Court: Mr. Heffernan.

Mr. Heffernan: Good morning, your Honor. Your Honor, we find ourselves in a very unfortunate situation once again. And the United States believes this court has no choice. It has to act. The City of Yonkers and four members of the City of Yonkers's council have acted clearly to defy this court and defy this court's order just as they have in the past.

The court's order is clear. The court's order is unambiguous and there has been clear defiance. Your Honor, the sanctions here are clearly not punitive. As the (157) court said before, it is a classic contempt situation. The court and plaintiffs here are not here to punish anybody. It is not the obligation of the United States here to fine somebody, to imprison somebody. It is our obligation to see that the orders of this court are obeyed. That is why we have proposed the order which the court entered last week. And that is why the court has to today take the strong action necessary to comply compliance with its orders.

The contempt sanctions here are clearly coercive. They will end when the city and city council comply with the court's order. They hold the keys to purging the contempt.

Your Honor, the city's argument that you can somehow divorce the city from the city council, from our perspective borders on the ridiculous. Under the city's view of things, once again it should not be held accountable for actions of its officials. Under that view, your Honor, it may well be the case that it shouldn't be held accountable for the constitutional and statutory violation found by this court over two years ago because it wasn't the city which took those actions, it was the city elected officials and the city's employees. That argument plain and simply has no merit.

The city has to be accountable for this court (158) and obey the orders of this court, and the contempt sanctions must be imposed as the court has ordered. Your Honor, it is our strong belief that if those sanctions are imposed, compliance will be coerced and the remedial process can go forward.

The Court: Mr. Sussman.

Mr. Sussman: Your Honor, may it please the court, as the court is aware the NAACP has previously taken a view in counsel to the court that the imposition of fines and potentially jail sentences might not work, but that should not obscure the issue we are here today on. The issue we are here on today in terms of the legal test is whether as Mr. Heffernan has said the fines and the potential jail sentences are in fact meant to be coercive or punitive.

And on that legal issue, it seems to me obvious that whether I believe as council for NAACP that the measures will work or will be effective in getting long-term compliance it not the issue. It is the court's intent and belief which is clear that they will be. Therefore, that combined with the fact that the condemnor, the City of Yonkers, holds the key to its own liberation so to speak from the fines and potential jail sentences makes these fine clearly remedial and not punitive.

Any reviewing court looking at the situation (159) should clearly be able to distinguish it from the situation that we happened when waiting for a Second Circuit argument in the case two weeks ago in which the court of the Eastern District of this

circuit imposed 15 day jail sentence upon a party, but there was no act that party could take to free itself from the jail sentence. The Court of Appeals was looking at that and wondering how that could be deemed remedial. This is clearly not that case. This is remedially intended sanctions.

I just want to make a couple of other comments. I think what Mr. Sculnick enumerated in terms of the harms to the city are like the city's willingness to spend $29 million to get out of building 200 units of housing. What those statements do in my opinion is not provide a reason or rationale for why sanctions are inappropriate, they show the actual measure and extent of the contemptuous conduct.

If the city here, four members of the the council, are willing to bankrupt Yonkers rather than to let 4000 units, 3200 of which are intended for market rate users, be built, that only is a measure of the enormity of the hatred which exists. It is not an argument against contempt.

Let me speak to the distinction which is in the papers the city today tries to draw. Yonkers city council and the state law, your Honor, is the governing body or the City of Yonkers. The city administrator or city manager (160) and comptroller and other officials are merely employees of the city council. That they have here been somewhat independent and somewhat more progressive is irrelevant legally because the legal entity in Yonkers which can act is not the city administration. It is the city council.

Mr. Heffernan I believe is accurate in saying that that distinction has no legal merit.

Finally, I believe, your Honor, and I just want to reiterate the point made in the last court session that while the sanctions here must be imposed, the court cannot be seen as having made these threats and backing away from them. They are clearly legally justified. In our judgment they are insufficient, and I think that is perhaps the central issue that we may talk about later today.

What we had last night in the acting out and the attempt to not let others into the city council meeting who have a different point of view, and all of those tactics which frankly in a demo-

cratic society are regrettable, what we have is a continued demonstration that the city council cannot implement.

Your Honor used the term advocating governmental responsibilities. Of course the city council won't make that declaration because it is not advocating government responsibility. It is doing the will of the people. The court has posed a paradoxical situation.

From the court's (161) point of view and perhaps my point of view, they are not governing consistently with the constitution. But from their point of view, they are at the pinnacle of efficacy. And that was the rationale of Mr. Fagan, one of the condemning parties used in explaining his vote.

He said, "I wasn't going to make clear my view until I came and saw how the people wanted me to act." It is the same thing that Cipriani and Longo said in 1982 regarding School 4. The same reference is used and in their mind they are governing with great efficiency and great fairness to their people.

The point I am making is that as long as that is the reference—and I believe it continues to be the reference—another structural change is required or else the City of Yonkers believing that it is governing truly to the wishes of its people will continue to act in contempt and we will not get housing built. And frankly that is their goal. So they become in a sense the winners.

I think the contempt is clearly justified against the city. This court would be fully within its legal responsibilities and rights and authority to impose contempt and the prudential consideration which I have otherwise urged against do not apply because the court order isn't stayed. I want to make that distinction. Thank you.

(162) The Court: Anything further with respect to the City of Yonkers?

Mr. Sculnick: Just briefly, your Honor. Just addressing the distinction between the city council and the city, those kinds of distinctions are made all of the time in the law, and I think that they are especially forceful in this case where the city council members while elected and have the authority to take specific actions under state law, there are greater manifestations of the

city at large. There are the citizens, the employees of the city, and the people in the city who depend upon the city services.

The city administration takes responsibility to implement its objectives in providing city services. So that I think that in many respects those distinctions are valid ones. It is a distinction we have long recognized between a corporation and its board of directors, and I think that that analogy is somewhat applicable here.

So although it is true that only the city council under state law is authorized to take the actions that this court has ordered, for that very reason, it is unfair to fine the city since but for the action of its council members, the city is powerless to comply with the court's order. Therefore, in that sense, the fines will have a disastrous impact on innocent people who are unable to actually effectuate—

(163) The Court: A long time ago I used the analogy of a factory that was spewing out polluting fumes to a community and was ordered by a court to cease contaminating the community. The response was, "well, we presented this to our board of directors and we couldn't get a majority" or I think the analogy was, "we are split 4 to 4."

Mr. Sculnick: In that case the plant manager could have turned the plant off. There were actions that could have been taken to comply with the court order.

The Court: Turn off the City of Yonkers? Some people are bent on just that course.

Mr. Sculnick: That is indeed an unfortunate result that may obtain and that is exactly why we are urging that the city not be fined itself. Thank you.

The Court: The following constitutes the findings of fact and opinion and conclusions of law of the court with respect to the City of Yonkers and whether pursuant to this court's order of July 26, 1988, it should be held in contempt. It is important to recognize at the outset the true significance of this proceeding. It would be difficult to imagine a clearer challenge to the constitution of the United States and to a government of law than that presented this morning.

If a federal court order designed to remedy racial discrimination can be flouted by a municipality (164) because that is what

appears to be the course of political expediency, then we no longer live under a constitutional form of government. Then one has to put an asterisk to the constitution and say, "Provided, however, that if the community is sufficiently hostile to remedial action designed to insure and protect these rights, then all bets are off."

The magnitude of the issue before this court is no less than that. The tragedy of this is that the victims of all that has happened are the citizens of Yonkers including, of course, the members of the class on whose behalf this action was brought. The extent of the resistance by the City of Yonkers and its elected officials and segments of its population to the enforcement of remedial order of this court is unprecedented, and yet this is the same community which in other contexts has shown that with responsible leadership and a well motivated staff, much can be accomplished.

I refer to the experience with respect to the school orders which we will address later this week where there is every reason to believe that in good faith the responsible officials have been carrying out the court's orders and with results which exceed expectations, and it is the same city.

The city council of Yonkers has chosen (165) deliberately to defy the court with respect to an aspect of the remedy proceedings which have in fact been the subject of very little controversy. The City of Yonkers through its council has represented to this court that there are no substantive objections to the affordable housing ordinance.

It is separate and apart from the public housing issues and all the controversy which surrounded the designation for the sites for that housing. It is very clear Yonkers has said, "We alone among the communities in this country will not obey federal court orders because we perceive—we, the elected officials perceive that it is politically to our advantage to do so." We will address later this morning the question of individual responsibility of individual city council members.

The court finds that the City of Yonkers has been given adequate notice of these proceedings and an opportunity to be heard. The court finds that the City of Yonkers is in contempt and indeed this is but the latest of a series of contempts, but

this is the most immediate and most clearly defined. The court rejects the contention that a dichotomy can be drawn between the city and the city council. We addressed at some length in our liability opinion this question of the spreading of authority among different entities with a hope that responsibility will be escaped by all.

(166) The City of Yonkers is in contempt because it intends to be in contempt. No claim is being made of any procedural defect. No claim is being made of a failure to understand or perceive the consequences of the contempt. Yonkers chooses to place itself in contempt and the consequences of that are the responsibility of Yonkers and those who speak on its behalf. Accordingly the court finds that the City of Yonkers is in contempt and the court then, therefore, imposes upon Yonkers the fines beginning on August 2, 1988, set forth in paragraph j of the order of July 26th.

Therefore, there is to be delivered no later than 4:30 p.m. today to the clerk's office the check payable to the clerk, Southern District of New York. That is the responsibility under this order of the city manager and I am sure there will be compliance with that. Those fines will continue doubling each day.

Mr. Sculnick: Point of clarification on just that last sentence. My reading of the order indicates that today is the first day that the city be held in contempt, that that check is to be delivered no later than 4:30 tomorrow reflecting the fine imposed today. Is that correct?

The Court: Yes. That is correct.

Now, the question raised then is how long does (167) this continue? It will continue? It will continue as long as the city council continues to defy the order of the court and the fines will mount. This court is open at all times to any application that may be made based on a change in circumstances which would warrant a change.

I repeat—I say it over and over—that this court is not the only institution which has the responsibility for protecting and enforcing the constitution and the laws of this land. As so often happens, it is the very people who do not come forth when they have the responsibility to act who are often heard to talk about federal judicial activism. I believe no court has strained

harder or with greater patience to defer to state and local government than this court has done.

The other officials of the state who have taken oaths to protect and defend the constitution, the members of the Emergency Financial Control Board and all others are on notice: The course on which Yonkers is headed is clear.

Let me make one other point with respect to the fines that perhaps I had not made clearer at an earlier date. I think Mr. Sussman on behalf of the NAACP at one point expressed a concern that there would be a period of contempt and then a period of compliance and then a further period of contempt. I want to make it clear that it is this court's intent that it occurs, then, of course, (168) the level of subsequently daily fines picks up at the point at which it ended as a result of any previous finding of contempt.

Anything further with respect to the City of Yonkers?

Mr. Sculnick: Yes, the city would apply for a stay of the court's finding on contempt and imposition of fines and the city would make the following specific suggestion in that regard: As I indicated earlier today, the city council took two actions last night. One of those actions was the setting down for public hearing of the zoning ordinance and a public hearing to be held on August 15th. The city would suggest that the fines against the city be stayed until August 15th, and that if at that time the council fails to adopt the ordinance, that at that point the fines would resume as compounded for the intervening time period.

The Court: Mr. Sculnick, seated behind you are all of the members of the city council of Yonkers. Are you making a good faith representation to the court that if such a stay were granted, you have reason to believe that on August 15th, the ordinance would be passed? Are you making such a representation?

Mr. Sculnick: No, your Honor, I don't have the factual basis for making that statement.

(169) The Court: I know that you don't and I did not mean to create any personal embarassment. Let me deal with the matter of August 15th. The question was raised I believe by your office after the July 26th order was signed in open court

concerning state law provisions with respect to the time for a city council proceeding to amend the zoning law. Rather than deal with the question of the extent, if any, to which those time tables were superseded by the federal court order, just to obviate that question, the court indicated that it would suffice if there were a declaration of intent, to adopt the resolution after the requisite time period had elapsed. And that resolution was defeated.

I have to repeat two points. One is there has been no substantive objection made to a single provision of the affordable housing ordinance and the second is as I said in my earlier remarks the City of Yonkers is in contempt because it chooses to be in contempt. It does not find itself inadvertently in this posture. This is not an instance of a miscalculation or a misapprehension or a mistake of law or of fact. The application for a stay is denied. You have until tomorrow before you present your first check.

The elevator leads to the Court of Appeals and the clerk's office. Should you wish to make an application (170) to that body, the Court of Appeals is now being alerted that such an application may be made.

It is not in the interests of Yonkers to prolong this. How many weekends should Yonkers spend similar to the last one? There are instances in which delay or the opportunity for cool dispassionate reasoning will alter the circumstances. This is not such an instance. The application is denied.

Mr. Sculnick: Your Honor, may I briefly respond to the court's statements that there is no substantive dispute as to the zoning ordinance?

The Court: Yes.

Mr. Sculnick: At our prior court hearing, I made the city's position clear that we had opposed the entry of the long-term plan order and presented various specific objections to the court and, of course, we stand by those objections. Otherwise the statement is accurate.

The Court: By using the phrase substantive I meant to incorporate that by reference. We will take a brief recess. After which, we will deal with the matter of the individual city coun-

cilmen. May I have the names of the four city councilmen who are subject to these contempt proceedings?

Mr. Sculnick: Vice-mayor Henry Spallone, Minority Leader Longo, Edward Fagan, and Peter Chema.

(171) The Court: We will take a five-minute recess.

Mr. Sculnick: are the councilmen who voted in favor of the ordinance excused from further proceedings? It was our reading of the July 26th order that all council members were required to attend today's session. Are they excused from further proceedings?

The Court: I would think that the magnitude of these proceedings is such—

Mr. Sculnick: They are welcome to attend, but I want to clarify whether or not they are required to attend.

The Court: I won't require them to attend. I would urge that they do so. I can't think of anything more important to the City of Yonkers. If they can personally do so, I think they should. If at some moment, if some matter may arise such as arose a few moments ago in which it might become appropriate to confer with the members of the city council, it would be helpful to have them present. Perhaps a quorum would be needed.

(Recess)

The Court: Mr. Spallone, is he in the courtroom?

(Pause)

The Court: Do you have an attorney?

Mr. Spallone: No, I do not.

The Court: Do you wish to have an attorney?

Mr. Spallone: I would like to have time to get (172) one, but I am prepared to make a statement if I may.

The Court: How much time do you need to get an attorney?

Mr. Spallone: I think I would need at least 24 hours.

The Court: Well, Mr. Spallone, you know you have been on notice for quite some time of the pendency of this.

Mr. Spallone: I am still willing to make a statement. That would be up to you.

The Court: Mr. Spallone, I think that—

Mr. Spallone: Your Honor, I know the consequences and I recognize the position that I am in. And I have been—

The Court: I will adjourn the matter of your contempt until 10 a.m. tomorrow with the understanding and condition that your fines will be, if imposed, will be retroactive to today. Thank you. You may be seated.

Mr. Longo, you are here with counsel I believe.

Mr. Longo: Yes.

The Court: Who represents you?

Mr. Longo: Mr. Sykes.

The Court: Please step forward. You represent whom?

Mr. Sykes: Councilman Longo and Councilman Fagan (173) as well.

The Court: Longo and Fagan. I will hear you with respect to the question why they should not be held in contempt of this court's order of July 26th.

Mr. Sykes: First I would point out to the court that I was retained in this matter early this morning; Consequently I would like to have a reasonable adjournment in order to adequately prepare myself and familiarize myself with this case.

The Court: You see there is or there has to be a realization that we are dealing with an emergency situation here. Now, this order was July 26th. Your clients had ample notice that this motion would come and what the issues would be.

One of the things that we are fighting—and I use that term advisedly—that the court is fighting are the efforts that are made to achieve delay. I will hear you. We will rule on the matter this morning. If thereafter you should believe that there is some legal argument or theory or circumstance which you wish to assert on behalf of your clients which was not available to you this morning, you may make another application and I will hear it.

Mr. Sykes: That is the purpose of this application. I don't think there was any certainty as to (174) which the council would vote particularly with respect to my client Mr. Fagan as

to which the vote was taken last night. I was not aware of the contents of the order.

The Court: I am not faulting you, sir, if you were retained this morning. I am saying that your clients had full opportunity to know this and indeed I believe Mr. Pickelle made it a part of the public record that his office would not represent the individual city councilmen. Do you wish to be heard on the merits on the order to show cause?

Mr. Sykes: Yes, I do. I would reiterate the need to have a reasonable adjournment so that I could adequately represent my clients in this matter.

The Court: I repeat that I will proceed this morning because we are dealing with exigent circumstances and we will reserve to you the right to make any subsequent application to rescind or modify this court's order. You may proceed.

Mr. Sykes: If the court please, I believe the court found in its previous finding that there is no dichotomy between the City of Yonkers and the city council. That could not help one to conclude that finding made by the court with respect to the City of Yonkers could be equally applicable to councilmen Longo and Fagan. However, I believe that the councilmen did not act in bad faith and there was no intentional disregard of the court's order; (175) therefore, they should not be found in contempt.

The Court: When you say they did not act in bad faith, they acted with an intent, did they not, to be in contempt of this court's order? They were on knowledge that that was the consequence of what they did. And good faith or bad faith is really not the issue. The issue is: Did they consciously, deliberately choose to be in contempt of this court's order?

Mr. Sykes: Your Honor, there was substantive basis with respect to the action taken by Councilmen Longo and Fagan inasmuch as the affordable housing ordinance provided more amendments of the zoning ordinances which clearly were defective procedurally and that they denied the planning board's input and also denied the opportunity for a public hearing. And on that basis, the councilmen acted in the manner they did.

The Court: Are you representing to the court that the reason why Councilmen Longo and Fagan among other things voted against the resolution of intent was because of this procedural

defect and that but for this alleged procedural defect, they would have voted in favor of the ordinance? Are you making that representation to the court?

Mr. Sykes: Would the court instruct me with respect to the resolution of the intent, passage of which (176) if I understand it clearly, would have made the affordable housing ordinance a *fait accompli*? If that is the case and there is a procedural defect with respect to the affordable housing ordinance, a *fortiori,* I believe the councilmen are not acting in bad faith if they believe there was a procedural defect with respect to the affordable housing ordinance.

The Court: And the question is: Is that the reason? Do they now want it to be a matter of public record that but for the so-called procedural defect they would vote for the housing ordinance? Is that what they are saying?

Mr. Sykes: Your Honor, I am saying that was a concern they had among others. I think there were several substantive objections that they had to the affordable housing ordinance as well. But in terms of their potential—

The Court: What are they? And did they move to amend it, or did they put forth any suggested changes or modifications?

Mr. Sykes: I am speaking on information and belief. I believe these issues were addressed by Mr. Longo and Mr. Fagan. I am sure the Court is aware of it.

The Court: The court is not aware of a single substantive ojection as the term has been defined in the colloquy with Mr. Sculnick to the affordable housing.

(177) Mr. Sykes: The primary concern is the procedural defect we perceive with respect to the zoning amendment. On that basis my clients acted the way they did. I don't believe the court could find that they were contemptuous in their actions.

The Court: Prior to August 1st, the city council of Yonkers adopted a moratorium with respect to all housing and adopted a resolution to rescind the seminary condemnation proceedings, both of which resolutions I am told counsel for the city council, counsel for the city, advised were unlawful, contrary to the orders of this court and advised that they would take no steps to implement them.

There were no so-called procedural defects with respect to those resolutions, were there?

Mr. Sykes: I am not familiar with that, your Honor.

The Court: Is there anything else you want to tell me?

Mr. Sykes: I just reiterate my request for a reasonable adjournment, your Honor.

The Court: Thank you, Mr. Sykes. Mr. Heffernan.

Mr. Heffernan: Your Honor, on the issue of counsel, it was clear last week as represented to me by Michael Sculnick that the city council persons had been amply informed that the city representatives, namely Mr. (178) Sculnick and Mr. Pickelle, were not going to represent him at this hearing.

They had more than ample notice since frankly this has been going on for two or three weeks that we have been discussing the order and content and what needed to be done for a long time. They knew exactly what needed to be done. They had to pass a resolution last night and they didn't do it.

Quite frankly bad faith, good faith doesn't make much difference. The issue here is: Are they in contempt of the court's order? They are plain and simple. They didn't do it. I don't know if it can be more clear. They are covered under Rule 65 of the Federal Rules. As city council members they are bound by this court's order. In our view there is no question here that they are in contempt.

The Court: Mr. Sussman.

Mr. Sussman: I belief that the motivation for the actions of the council members who are now being discussed was best made clear by their own words frankly rather than having some other representation of what is being said as to their motives.

This morning in the Herald Statesman, Mr. Longo did explain publicly his vote and he said, "It is a typical case of the hypocrisy of the rich and elitist looking down (179) on those who must work for everything they have."

He is quoted as being attributed to him the fact that "The judge's order attacked the quality of life in Yonkers." Mr. Longo made other public statement comparing this court to a dictator. We won't go into all of those. I know the court has seen them.

On the front page of the New York Times Mr. Fagar was asked to explain his vote and I saw him on television last night saying much the same thing. He said his vote "was an act of defiance. The people clearly wanted me to say no to the judge."

Now, with all due respect to Mr. Sykes, I don't really believe for one moment that there is any procedure issue or any other issue here. None was raised at the meeting last night. One of the reasons we sought entry to the meeting is so we could hear the debate and know the position, what was said in the situation.

I believe the court should require the city to produce a tape of the meeting so it can be part of the record so no claim can be advanced without a record that certain things were said and meant and other matters.

The Court: Is there a tape which is in the possession of the control of the city?

Mr. Sculnick: No, your Honor. An outside entity called Cable Vision prepares and produces the tape. (180) The city does not have it.

Mr. Sussman: We are at a very great disadvantage. We can't go to the meeting and can't hear the meeting.

The Court: Can't go to the meeting. Will you explain it?

Mr. Sussman: I think it is important because it—this kind of situation is precisely the difficulty.

Mr. Sculnick: I want to correct my prior statement. I have been advised there is a tape recording of the city council meeting last night that the city has that the city clerk maintains. I was thinking videotape.

The Court: I will deem that to be Court's Exhibit A of today and direct that a copy of it be furnished to the court by the close today, at 4:30, and kept as a court document.

Mr. Sussman: Briefly Mr. Wallace, the branch president called the city mayor's office yesterday in the afternoon and informed him it was the desire of Mr. Wallace and several other branch members to attend the meeting and would like that arrangements could be made so we could attend the meeting. The court is well aware of the atmosphere and the problems with the meeting.

Mr. Wallace called me and indicated that the mayor felt that I shouldn't come to the meeting, etc., and (181) I indicated that I felt given that we were going to be here on contempt, I didn't know if these people were going to take the stand. It was important that I attend the meeting and hear what occurred.

We were directed to report to a certain door between 7 and 7:30 and told we would then be escorted into the meeting. Mr. Wallace, myself, and an associate of my law firm went to that door about 7:25. We were placed literally in physical jeopardy, in significant physical jeopardy.

What occurred was that we waited by this door. A crowd amassed of about 125 or 150 people. Several police cars between us and this jeering crowd. We waited for literally 25 minutes before anyone even came although we were telling the police that we had this arrangement and we assumed they were aware of it. Finally Mr. Sculnick came down and indicated there was no room for us at the meeting. And we waited—

The Court: Mr. Sculnick personally advised you?

Mr. Sussman: Yes.

The Court: That you could not be admitted to the meeting because there was no room?

Mr. Sussman: For us. The TV cameras were going and I said, "I wish this were not a matter of public record." I found it embarrassing for him. It was so ridiculous. I (182) indicated to him having conferred with Mr. Wallace that we had been advised to report to that door at a certain time and that we had been there then for about 20 or 25 minutes, we were subject to all sorts of verbal attacks.

The Court: You were not—

Mr. Sussman: He came back again and told me again after further conference the city felt that we couldn't come to the meeting. There was no room. Now, the point—

The Court: You will have the tape by 4:30 and anybody who wishes will make arrangements. Any counsel in the case may have access to the tape.

Mr. Sussman: I think the point is that the reasons these gentlemen voted the way they did is clear from the public statements. They have no privilege with respect to the statement. They should be held in contempt and fined $500 a day. I dis-

agree and I want to make it part of the record with any adjournment for Mr. Spallone who has been saying for a number of months he wants to defy the judgment. I don't see any basis for any adjournment.

The Court: Mr. Longo, Mr. Fagan, would you step forward, please?

Mr. Longo, you have heard what has been said this morning? Is there anything you wish to say to the court before I make a determination with respect to contempt?

(183) Mr. Longo: Yes, your Honor. I think this is in response to some of the comment made by the counsel, and that is that certainly the citizens of Yonkers ought to be afforded the opportunity of a public hearing. For me to have voted in favor of that ordinance before availing myself of the opportunity of the experts that are employed by the city and by the public would have been wrong. It disenfranchises that public.

The Court: And that the reason for the vote—

Mr. Longo: And that is the reason for voting against the resolution. And it would seem in voting for the resolution it would preclude that input, and I was not favorably disposed to vote in favor of that. There was a public hearing for that ordinance. It was set with no objection by any of the council members. And in my remarks last evening I alluded to the fact that the public was being disenfranchised.

The Court: You are representing to the court that was the reason for your vote?

Mr. Longo: Yes

The Court: Mr. Fagan.

Mr. Fagan: The resolution that was put before us yesterday would have in fact cut out all meaningful public input. And after the resolution passed, it would (184) preclude input and any subsequent changes to what may happen to that resolution. That was the reason for my vote.

The Court: That was the reason for your vote? Are there any other applications on behalf of Councilmen Longo and Fagan other than those that have been stated? Are there any other requests of any nature whatsoever?

Mr. Sykes: Not at this time.

The Court: The court finds that Councilman Longo and Councilman Fagan are in contempt of this court's order of July 26th. The court rejects as a frivolous pretext the claim that a procedural defect under state law is the explanation for their vote.

How much hypocrisy must be occasioned by this litigation? One cannot say one thing to the world at large and make another representation to the court. The court finds there has been ample notice and that the commission of the contempt is beyond dispute. Accordingly, the court finds you, Councilman Longo and you, Councilman Fagan, in contempt and imposes upon you personally a fine of $500 per day every day until such time as you shall have purged yourself from contempt as set forth in the terms of the July 26th order.

The fine shall be payable by a check drawn to the clerk, delivered to the clerk no later than 4:30 on each day that the clerk's office is open to the amount of (185) the fine incurred for the previous day. The provisions pursuant to which you may purge yourself of the contempt are set forth in the order.

You are further personally notified by the court pursuant to the provisions of paragraph 5 of the order that if the necessary legislation is not enacted by on or before August 10, 1988, and I include in that just again to obviate this question of state law and the dates contained in the state law provisions, a resolution of the intent of the city council will be adequate for these purposes. But if it is not enacted, and if such a resolution is not enacted on or about August 10th, then you are subject to commitment on August 11th to the custody of the United States Marshals until such time as you have purged yourself of contempt.

Do you understand?

Mr. Longo: Yes.

Mr. Fagan: Yes.

Mr. Longo: Yes.

Mr. Fagan: Yes, your Honor.

Mr. Sykes: May I be heard? I would make an application for a stay of the court's finding of contempt and imposition of fines.

The Court: Fine is not payable until 4:30 tomorrow. I say to you as I said to Mr. Sculnick, you are (186) certainly free to take the elevator, go up to the Court of Appeals and make your application to that tribunal. The staff of the Court of Appeals has been alerted to the fact such an emergency application will be made; otherwise this court denies the stay.

I may say that, Mr. Sculnick and Mr. Sykes, if the Court of Appeals requires a written order from you denying the stay, prepare such an order and I will sign it forthwith.

Mr. Heffernan: Your Honor, for the record, I would like to note the objection of the United States to any granting of the stay.

Mr. Sussman: NAACP shares that view.

The Court: There remains Mr. Chema.

Mr. Chema: I am represented by my attorney. May I come forward?

The Court: Yes.

Mr. Harmon: I am James Harmon. Good morning, your Honor. My name is James Harmon. I am here, your Honor, for one narrow purpose. I represent one man and as I understand it having also been retained at 8 a.m. this morning, the sole issue is whether there was a willful violation of a lawful order of this court and whether any such violation was committed without justification.

To some degree I feel like I am the man who (187) landed from Mars here this morning after a long history of litigation in this case, being asked to come in and present to your Honor the position of this one man who does not seek notoriety, who is an ordinary person, who fulfills his position as a member of the city council, a part-time position, who otherwise supports his wife and family and who really, your Honor sees no future in martyrdom.

So I come before your Honor asking you to understand that it was not clear until this vote last night that Peter Chema was going to need an attorney this morning.

The Court: I can't accept that. I mean I accept that it was not clear to you. I understand you have just been retained this morning. I didn't mean to be facetious, but the course on

which Yonkers has been headed and has been headed for months has been a very clear course.

This is not the first occasion on which this court has indicated an intent to use its contempt powers should the need arise. You know the nature of the fines, nor should it have been any surprise to any responsible public official that he would have a personal responsibility for his acts. It was very simple.

The issues before the city council yesterday were clear issues. There was a very explicit court order and the alternatives were comply with the court order or not comply and be in contempt. The consequences of being (188) in contempt were spelled out chapter and verse in the court's order of July 26th. So when you say it wasn't clear until this morning, I have to say it was not clear to anyone who is not familiar with these proceedings. But it was crystal clear to anyone who was familiar with these proceedings.

Mr. Harmon: What I mean by my statement, your Honor, is that in theory the order was violated only after a vote was taken. And it was not clear until after the vote was taken that under any set of circumstances there, in fact, your Honor's court order would have been violated.

The Court: As I stated to Mr. Sykes, although this is the preciptating event, the straw that breaks the camel's back so to speak, there is a history here. The Department of Justice was seeking contempt a few weeks ago when the city council adopted two resolutions which it knew, which it had to know were unlawful and in violation of orders of this court.

I don't think they will be heard to say that they are so obtuse as not to have fully appreciated the consequences of their actions.

Mr. Harmon: Yes, your Honor. I think although I must say that I am not deeply familiar with the facts of this case, your Honor, I do have some familiarity with the law of contempt. And I would suggest that it is important (189) here, your Honor, that this clash of constitutional obligation, not in any way works to deprive the rights of this individual, Peter Chema.

I would suggest to your Honor—and I hope your Honor would agree—that it is as important as to how your Honor would reach a conclusion as to Peter Chema as well as to your ultimate decision.

The Court: I think it is an extraordinary circumstance. I know of no parellel for a court to say to elected official, "You are in contempt of court and subject to personal fines and may eventually be subject to personal imprisonment because of a manner in which you cast a vote." I find that extraordinary.

I find it so extraordinary that at great cost in terms of time and in terms of money and energy and implementation of court's orders, I have sought alternatives to that. But they have been unsuccessful. So it came down then to a very simple question last night. And that is regardless of his personal views or personal sentiments, whether he was going to obey a federal court order or defy it. And that is the choice he made as crystal clear as it could be.

Mr. Harmon: We would suggest to your Honor that summary disposition of this contempt, alleged contempt, is not appropriate in this case.

(190) The Court: Now, you have used a procedural term. You are talking about summary disposition. Is there any hearing or other procedure that you seek?

Mr. Harmon: Yes, your Honor.

The Court: What is that? Tell me that.

Mr. Harmon: First of all, we believe and I would cite for the general proposition Ketchen 706 Fed 2d 1266. The constitution provides certain procedural safegurads for the person alleged be be in civil contempt. Among those are right to counsel, counsel adequately prepared to protect his interests, the clear issue of intent and willfulness on his part which can in fact be resolved by his credibility on the witness stand.

In addition, he has a right, we submit, to present witnesses on his behalf.

The Court: Do you wish to hold an evidentiary hearing? Fine. We will hold it forthwith. Does Mr. Chema wish to take the stand?

Mr. Harmon: What I say is my retention by Mr. Chema was at 8 a.m. We are not prepared to make the kinds of judgment

that we think that the constitution permits Mr. Chema to have access to before proceeding before this court.

We respectfully request an adjournment to address and think about it.

The Court: How long do you wish?

(191) Mr. Harmon: Two weeks.

The Court: Denied. You don't wait for two weeks while the house is burning. You don't wait for two weeks when you are told that the bond rating company is going to act within the next day or so or perhaps it has already acted in a fashion which is going to have extremely adverse consequences to Yonkers.

Mr. Harmon: Your Honor, if the court is not inclined to grant a two-week adjournment, we leave it to your Honor to suggest a reasonable adjournment given the entire history of this case.

The Court: Tell me the purpose. Now, Mr. Spallone did not have counsel. I think that very basic right is to have counsel and his request was for an adjournment until tomorrow, and I granted that.

Now, you have made two requests. And you made a request for an evidentiary hearing and I grant that request.

Mr. Harmon: I did not make that request. I requested the opportunity to evaluate as a lawyer should whether or not an evidentiary hearing is required in this case. I certainly can't do that without knowing the facts of the case. So we would like the opportunity to evaluate his position, your Honor.

The Court: But Mr. Chema elected in the face of the July 26th order, in the face of the explicit advice he (192) received from the corporation counsel of the City of Yonkers that he would not be representing him today, to wait until this morning.

Now, I will make the same ruling as I made with respect to Mr. Sykes' application. I am going to proceed this morning in whatever fashion you wish. If you wish an evidentiary hearing, the witness stand is there. Mr. Chema is free to take it and without prejudice to any application you wish to make to re-open the matter based on whatever it is that your further discussions with Mr. Chema or your research indicates.

I think the elements of contempt are very clear. There is no question that there has been notice. There is no question but that there has been a specific order of the court, and there is no question that there has been a failure to comply with that order. There is the opportunity now to be heard. The time and place of this hearing was scheduled on the 26th of July.

Mr. Harmon: I appreciate the opportunity that the court has given us this morning, your Honor, but I must say also in good conscience that we would not be able to adequately represent Mr. Chema's interests given the short notice to his counsel.

The Court: I just want to say again that the shortness of that notice is the result of Mr. Chema's (193) decision not to seek counsel until this morning. It is not a failure on the part of the court or of the parties to give Mr. Chema ample notice of what the issues would be this morning.

Mr. Harmon: If the court, therefore, is inclined to go ahead, fine. It sounds to me the court is inclined to go ahead.

The Court: You got that message.

Mr. Harmon: Even if you just landed from Mars at 8 a.m. this morning, it doesn't take long to get that message.

The Court: Because the people of Yonkers are entitled to have these matters end, not to have this drain, this emotional, fiscal drain. You have got to create a community in which people can live together. And this is creating a community in which you have a different circumstance.

The complaint was filed in 1980. It is always the case that when counsel comes in late in the case and the reaction is, "What is the great rush?" The great rush. It may appear to be a great rush to somebody who is retained at 8 a.m. on August 2nd, but to the people whose constitutional rights have been violated and who have been waiting for years for a vindication of those rights for redress and remedy, there hasn't been a great rush in this (194) case.

Mr. Harmon: I understand that I am bearing the burden here of a lengthy history of this case, your Honor. We would also again argue that the contempt such as it may have been did not occur until sometime last night.

The Court: I want to make it clear again because I don't want in any other procedural context there to be any ambiguity

about that. To the extent that you request an evidentiary hearing, that request is granted. What is denied is the request for a two-week adjournment.

Mr. Harmon: To the extent you are inclined to go ahead, when the court does deal in civil contempt and sanctions under contempt, you are dealing with human dynamics and the effect of the coercive power of the court and what response that course of power may engender.

You have talked here I think very directly and eloquently here this morning about the other remedies open, options to other public officials to take action which apparently they have not done as of this point in time. You have also gone ahead and imposed a serious civil contempt sanction on the City of Yonkers.

It seems to me that although that civil contempt sanction is directed at the city itself, there is nothing that says that this contempt sanction can't have a really personal result on public officials themselves. So that—

(195) The Court: Personal result?

Mr. Harmon: Yes.

The Court: Personal responsibility. It is a human being that casts a vote. It is a human being who has taken an oath to protect and defend the consitution. Of course, it is personal. We deal with human beings fortunately.

Mr. Harmon: What I would suggest here, your Honor, is that this court allow the impact of the civil contempt fine imposed upon the City of Yonkers to have its impact and to run its course—

The Court: You see the little pas de deaux? The city is saying, "It is not our responsibility. It is the city council." And the city councilmen are saying, "Let the impact on the city run its course", and in the meantime, the housing isn't being built.

Mr. Harmon: We suggest what is the purpose of civil contempt? To have the coercive effect of the court's sanction and order produce the result that the court wants.

The Court: Mr. Chema as you know has the opportunity to purge himself of contempt as sert forth very explicitly in the order, so that it is not the circumstance that he has no alterna-

tive. He has a very clear alternative. Indeed the purpose of civil contempt is for there to be the alternative of compliance.

(196) Mr. Harmon: We would ask that the court withhold any action with regard to judging Mr. Chema in contempt or imposing sanctions under a contempt order until the imposition of the fine against the City of Yonkers has had some opportunity to be tested. Other than that, your Honor, other than what I have already stated, we simply are not in a position to make a judgment as to whether or not Mr. Chema's interests both factually and legally are best served here by an evidentiary hearing.

We certainly know that it is not possible for us to address the legal issues that are raised here in such a short period of time. That concludes my statements.

The Court: Mr. Heffernan.

Mr. Heffernan: Your Honor, with regard to Mr. Chema, I don't think there is any difference between him and his vote last night and any of the other city council persons who voted against the resolution. From our perspective, they are clearly in contempt of an unambiguous court order. Your Honor, I didn't land from Mars this morning. I have been on this case for going on a year now—

The Court: You are a novice.

Mr. Heffernan: And I recognize that compared to the eight or more years of experience that some of the people in this courtroom have had in this case, that is not much. It has been long enough to learn a few things. It (197) has been long enough to ask the question before practically every hearing we have here, what is going to come up that is going to delay the thing further?

I hadn't thought of this one, your Honor. Now they come in this morning, the city council people, and make this claim that they haven't had a chance to consult with counsel. It is a ridiculous claim. They have been well aware of what is going on here. They knew they may need counsel as little as a week ago and probably a lot longer than that. So from our point of view, your Honor, the claim is simply pretext.

Mr. Hamon may have landed from Mars this morning at 8 o'clock, but it didn't take him long to come up with an argu-

ment that we heard on many occasions. Put the blame on the other guys. We shouldn't be accountable. We heard it a lot in the last several weeks.

The claim is basically let the city take the blame. Let the city pay the price for it. But why should city council members pay a price for it? After all they are only human? They are human. They are answerable to this court. They are answerable to the city. They are bound by this court's order.

There should be contempt sanctions. There is no doubt there is contempt. It should lie against Mr. Chema just as it should lie against any city councilperson (198) who voted against the resolution last night.

The Court: Mr. Sussman.

Mr. Sussman: Judge, I have two sets of comments. First of all, I just think for the purpose of the record it should be made clear that Mr. Chema was one of the two council members—and there are only two counsel members who voted on January 27, 1988, against the entry of the consent decree, against the long-term plan. And since that day, Mr. Chema to my knowledge, and I think the record would bear this out, has voted against every measure or voted in favor of many measures which have been intended to frustrate this court.

He has been quoted publicly on numerous occasions including in the last two weeks as saying that he would vote against this resolution at the point then in time that it was in fact an ordinance and not simply a resolution.

The Court: You are making this argument with respect to adequacy of time to obtain counsel?

Mr. Sussman: That is corrrect. And put it in some context of his frame of mind which can be derived from those votes. He is not a late convert to opposition here nor a late convert to knowledge of his acts which are contemptous of the court.

That to one side, I think we should have more (199) clarity frankly on the record as to precisely what the procedural status of Mr. Chema and perhaps the others, Mr. Spallone and gentlemen represented by Mr. Sykes, what their status should be.

It seems to me that the way it ought to be left is very simple. The court having given those who are represented by counsel an opportunity to be heard should be explicit and state that

should they demand an evidentiary hearing within a time period that is set after consultation, the court is prepared upon hearing the evidence that is presented to revisit the question and contrary to the procedure which was made clear, in fact refund any fines paid if in fact these people can show that they should not have been held in contempt. So that there is no question that procedurally their rights are protected.

They are not ready for evidentiary hearings today although they ought to be. I don't believe any such hearings will be held. I don't believe they will shed light on the contempt, maybe they would. The court should not be open to any procedural ambiguity. We know these things are going to be taken up and questions as to what the court was prepared to do.

In a prior case frankly where no evidentiary hearing was requested, we got to the Court of Appeals and there was a question why there was no evidentiary hearing. (200) That put me in a position of opposing the position and supporting the movant for a hearing in order to protect ourselves.

If these people want a hearing I believe by end of this week, it should be set. They should come in and the court should be on record as stating that their contempt if it is shown not to have been actual, any fines paid will be refunded.

The Court: Let me first of all say I am going to ask that the Department of Justice and NAACP prepare this morning—it can be in handwriting—a written order so that there will be a written, signed order for appellate purposes.

I will direct that the checks given by the individual councilmen be held by the clerk of the court for ten days, that is, until August 12th so that should there be reasons between now and August 12th to set aside the contempt, that power will exist. Let me make clear my intent with respect to that. If after an evidentiary hearing, I conclude that the city councilmen in fact were never in contempt, then the checks will be returned; but if I conclude that he was in contempt this morning, but was not in contempt or took remedial action, purged himself subsequently, then the checks will indeed be deposited.

Mr. Sussman: I think that is entirely (201) defensible. I think counsel should be advised it is within that period that they have

to that they must come in, rather than coming in on the 11th day and raising a question that it wasn't clear.

The Court: I would think we should set a more specific timetable. Mr. Spallone has until 10 a.m. tomorrow. Mr. Sykes. And Mr. Harmon, the only request that you made was for two weeks and that is unacceptable. Do you want to pinpoint a specific date?

Mr. Harmon: Yes, I think considering the lengthy history to this case, I think one week would give us our best opportunity under the circumstances.

Mr. Sykes: If I understand the court correctly are we to be afforded an evidentiary hearing?

The Court: You haven't requested an evidentiary hearing. Are you now requesting an evidentiary hearing?

Mr. Sykes: I am trying to understand what the court's statement indicated or is granting.

The Court: The law of contempt gives to your clients various procedural rights, notice, opportunity to be heard and the notice for a hearing. If you are making a request for a hearing, then we will set a timetable for it. If you want an opportunity to consider whether you are making a request for a hearing, we will give you that. Suppose we say 4:30 this Friday this court is to be advised (202) in writing by counsel for Chema, Longo, and Fagan whether they wish an evidentiary hearing.

If there is to be an evidentiary hearing, we will hold it on August 8th at 10 a.m. That is the following Monday. As I have already indicated, the clerk's office will hold the checks until August 12th.

Let's understand so that we don't expend needless time and energy what the nature of that hearing will be. I heard references to calling witnesses and so on. And if there are witnesses to the state of mind of Mr. Chema, then perhaps they can testify. I am not quite sure how that happens.

We are not retrying United States against Yonkers. We spent over 80 trial days doing that, nor are we trying the pros and cons of various means of creating housing. What we would be hearing at the evidentiary hearing relates to whether there is contempt, that is, whether in fact the councilmen voted in the way this court has been told they voted. That is the first ques-

tion. The second question is whether that constitutes a violation of the July 26th order of the court and the third would be any mitigating circumstance.

Let's define mitigating circumstance. Political pressure, constituent pressure, fear of unpopularity, fear of physical threats or safety, none of those are mitigating (203) circumstances. I am hard put and I will leave it to the ingenuity of counsel to think of what a mitigating circumstance might be, but we are available and we will hold such a hearing if requested in writing prior to 4:30 this Friday. Please respond in any event. That is, if there is no request for a hearing, let me have that in writing. If there is a request for a hearing, let me have that in writing.

Mr. Sussman: I agree with Mr. Heffernan and I think that the time for Mr. Chema to be held in contempt pending any such request is now. I don't see any possible defense. I think the history of his actions has been contemptuous and it didn't just start last night.

The Court: Mr. Chema, would you come forward please?

Mr. Harmon: May I make this representation to the court, if we make a judgment in advance of Friday at 4:30 there is no need from our point of view for an evidentiary hearing. I will let your Honor's chambers know as well as counsel.

The Court: That would be helpful.

Mr. Harmon: And if we decide to proceed on a legal analysis, we will advise your chambers and counsel for the government and the NAACP.

The Court: Thank you. I am told that for (204) portions of these proceedings one city council member was not present in the courtroom. I will assume that his colleagues will apprise him of all that has transpired in his absence.

Mr. Chema, you have heard what has happened this morning. The fact is, is it not, that you received notice of these proceedings and of the court's order and that you voted yesterday in the manner which has been represented?

Mr. Chema: Yes.

The Court: Is there anything you wish to say?

Mr. Chema: No, your Honor.

The Court: The court finds that you are in contempt. The court finds that there was adequate notice, that there was an

opportunity to be heard, and that there is no question but that there has been contempt.

As I have indicated I will direct the clerk to hold until August 12th the checks which you are to furnish on a daily basis beginning tomorrow and I will afford to you and your counsel if you request an evidentiary hearing.

I act now rather than wait until some later date because I perceive this to be a situation which requires immediate action and I cannot tolerate anything with smacks of dilatory proceedings.

Is Mr. Spallone in the courtroom? Mr. Marshal, (205) would you see if Mr. Spallone is in the hallway?

(Pause)

The Court: I don't think I will await Mr. Spallone's pleasure, but I would appreciate it if counsel would advise him of the scheduling that has been made with respect to the other city council members. I ask that he advise chambers, that his counsel advise chambers whether he wishes to proceed tomorrow morning as originally scheduled or to proceed next Monday.

Is there anything else? I would appreciate the preparation of a formal order embodying these rulings. Long hand will be sufficient.

Mr. Sculnick: Your Honor, I would like to request a meeting with the court in the jury room with all counsel at the conclusion of this. I have an application to make and then we can go back on the record.

The Court: Yes. We will adjourn and I will see counsel in the jury room.

(Recess)

The Clerk: Ladies and gentlemen, that concludes the proceedings for today.

EXHIBIT D—Long Term Plan Order of United States District Court for the Southern District of New York, Dated June 13, 1988.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH—NAACP, *et al.*,

Plaintiffs-Intervenors,

v.

YONKERS BOARD OF EDUCATION,

Defendants.

80 Civ 6761 (LBS)

LONG TERM PLAN ORDER

Section 17 of the First Remedial Consent Decree in Equity (the "First Decree") requires the City of Yonkers to take certain actions with respect to the long term housing plan (the "Long Term Plan") required by Section VI of this Court's May 26, 1986 Housing Remedy Order. Section 18 of the First Decree further contemplates that the parties may reach an understanding with respect to certain issues relating to the imple-

mentation of the long-term Goal[1] and shall set forth such understanding in a Second Remedial Consent Decree to be presented to the Court.

The City has failed to take those actions which are the subject of Section 17 of the First Decree. The City has further informed the Court and the parties that it will not negotiate toward reaching an understanding on certain other Long Term Plan issues, as required by Section 18 of the First Decree. In light of these actions of the City of Yonkers, plaintiff and plaintiff-intervenors have jointly submitted a Long Term Plan proposal for the Court's consideration, accompanied by their joint amended Long Term Plan comments and a joint motion for this Court to enter their proposal. Having reviewed these submissions, and the response of the City thereto, the Court hereby enters the following Order with respect to the Long Term Plan:

It is hereby ORDERED, ADJUDGED and DECREED:

SECTION 1. *Number and Distribution of Assisted Units.*

(a) Consistent with Section 17 (a) of the First Decree, the City shall condition the construction of any multifamily housing development (as defined in Section 17(a) of the First Decree and Section 2 below) on the inclusion of a number of assisted units in such development equal to 20 percent of the maximum aggregate number of units authorized for construction in such development. In instances where the existing zoning already permits a density of sixty (60) units per acre or more, the number of assisted units can be limited to 10 percent or more of the total number of units in the development, if the maximum density bonus that will then be given to the developer is not in excess of 50 percent over the permitted zoning. If the bonus

[1]All capitalized terms not herein defined are used as defined in the First Decree. Housing- and zoning-related capitalized terms (not defined herein or in the First Decree) used in Sections 2 and 8 hereof are used as defined in Chapter XVII of the Code of the City of Yonkers.

sought is in excess of 50 percent over the permitted zoning, the 20 percent ratio shall apply.

(b) The total number of assisted housing units (calculated as provided in paragraph (a)) in each such multifamily housing development shall be allocated to the income groups specified in Section 15 of the First Decree so that the number of assisted units respectively allocated (i) to households described in clause (b) of such Section does not exceed three times the number of assisted units allocated to households described in clause (a) of such Section; (ii) to households described in clause (c) of such section does not exceed the number of assisted units allocated to households described in clause (b) of such section; and (iii) to households described in clause (d) of such Section does not exceed one-third (rounded to the nearest whole number) of the number of assisted units allocated to households described in clause (c) of such Section. Notwithstanding the previous sentence, if the aggregate minimum number of assisted units to be allocated to any of the four income groups specified in Section 15 of the First Decree is attained before the minimum is reached for remaining groups, assisted units constructed thereafter shall be allocated (in the same proportion) only to income groups whose minimum has not theretofore been attained.

(c) The number of two-bedroom assisted housing units to be provided in each such housing development shall equal at least 60 percent of the total number of assisted housing units. At least 30 percent of the assisted units in each such housing development shall be three-bedroom units (or larger). Up to 10 percent of assisted units may be one-bedroom.

SECTION 2. *Target Areas.*

(a) The assisted housing requirement described in Section 1 above shall apply, until the Goal is reached, to multifamily housing (including apartment buildings, rowhouses or townhouses) located in zoning districts of East and Northwest Yonkers currently zoned MG, M, A, B and BA. In reviewing and approving development proposals, the Office of Imple-

mentation (see below) and the City shall seek, to the extent possible consistent with the timetable and goals of this Order, to assure the provision of assisted housing in a dispersed manner and so to avoid the undue concentration of both public and assisted units in any neighborhood of Yonkers. Priority shall be given to Long Term Plan proposals which avoid such concentration.

(b) Such requirement shall also apply, until the Goal is reached, to multifamily housing (including apartments buildings, rowhouses or townhouses) built in any zoning district of East and Northwest Yonkers (not currently zoned MG, M, A, B or BA) where multifamily housing may hereinafter be built pursuant to rezoning, special exceptions or otherwise.

(c) Notwithstanding paragraphs (a) and (b) hereof and anything set forth in the First Decree, the City may exempt from such requirement any multifamily housing development of fewer than ten units; provided, however, that such exemption shall not be applied to circumvent (by, for example, artificially subdividing one housing development into several developments of fewer than ten units) this Plan's purpose of requiring that multifamily housing in East and Northwest Yonkers otherwise contain at least 20 percent of assisted units.

SECTION 3. *Affordability Criteria.*

The term "affordable", as used in Section 15 of the First Decree, means, with respect to each income category described in such Section, assisted housing units (i) sold at a price entailing a monthly carrying cost (assuming a 10 percent downpayment, a 30-year self-liquidating mortgage, and including principal and interest payments, property taxes, homeowners association fees, but excluding utilities) not exceeding at any time 28 percent of the annual gross income of the household occupying the assisted unit or (ii) rented at a rent (including an allowance for utilities) not exceeding at any time 30 percent of the annual gross income of the household occupying the assisted unit.

SECTION 4. *Term; Transfer Restrictions and Occupancy Criteria.*

(a) Assisted housing units shall be rented or sold only to households meeting (at the time of rental or sale) the income qualifications contemplated in Section 15 the First Decree, as from time to time adjusted for the New York Metropolitan Area. Such units shall be the primary residence of the occupants.

(b) All assisted housing units subject to purchase shall have resale-price limitations (enforced by covenants running with the land, restrictions on registration of title, or any other appropriate legal mechanism approved by the City) which will ensure that for a period of thirty years from the time of their first sale such housing units are sold or resold only to, and at a price affordable to, a household which is, at the time of purchase, in the same income group (referred to in Section 15 of the First Decree and as at that time adjusted) as was the seller at the time such previous owner first occupied the unit. Such resale-price limitation may be amended by consent of the parties or motion to the Court if future experience with financing sources and/or income-qualified owners of assisted units should demonstrate the practical advisability of reformulating the applicable resale-price limitation.

(c) The owner of assisted housing units for rent shall be required to assure that, for a period of thirty years from the time of first rental, such units are affordable to, and are rerented only to, a household which is, at the time of re-rental, in the same income group (referred to in Section 15 of the First Decree and as at that time adjusted) as was the previous tenant at the time such previous tenant first occupied the unit. Assisted units for rental may be converted to units for sale subject, however, to the same ownership eligibility standards as applicable to units for sale for the remainder of the thirty-year period from original occupancy referred to in the previous sentence.

(d) The affordability and other restrictions on resale and/or occupancy shall not apply to (i) the transfer of ownership of an assisted unit between spouses or former spouses ordered as a result of a judicial decree of divorce or separation agreement (not including transfers to third parties), (ii) the transfer of ownership of a unit between family members as a result of inheritance, and (iii) formerly HUD-insured multifamily projects which, following default on the mortgage, HUD acquires or is mortgagee in possession ("MIP"), to the extent that the provisions are inconsistent with applicable HUD statutes and regulations regarding management or disposition of HUD-owned projects or projects for which HUD is MIP; provided, however, that transfers referred to in clauses (i) and (ii) do not extinguish such restrictions (whatever be the legal mechanism through which the restrictions are enforced) which shall be fully complied with in the event of any subsequent sale or rental of a unit not specifically exempted hereby. An exempted transfer as heretofore provided in paragraph (d) shall not toll the running of the thirty-year period referred to in paragraph (b) hereof.

(e) This Section shall not be interpreted as in any way affecting or diminishing, and shall apply together with, occupancy criteria (to be applied in good faith by the City or each developer) substantially of the type set forth in 24 C.F.R. §960.205 to ensure that the personal and financial background of each potential tenant or owner of assisted units will not be detrimental to the viability of the housing development.

(f) To the extent not inconsistent with other applicable occupancy and financial criteria, the City shall endeavor to give occupancy priority to:

1) persons who, between January 1, 1971 and the date assisted housing pursuant to this Decree is made available, have been residents of public or subsidized housing in the City or Yonkers. Such persons shall be given the first opportunity to apply for such housing, which opportunity shall be afforded up until thirty (30) days following the date the final assisted hous-

ing units pursuant to this Decree are made available. Occupancy choice from among such persons applying shall be on a first-come, first-served basis;

2) residents of the City of Yonkers; and

3) persons employed in the City of Yonkers.

(g) The Implementation Office (as defined in Section 11 below) shall be responsible for pre-screening applicants who wish to occupy (as tenants or purchasers) assisted units and for maintaining a list of such pre-screened applicants. Owners or developers of housing projects containing assisted units may be allowed to select tenants or purchasers of assisted units from among the applicants pre-screened by such Office. The Implementation Office shall be responsible for monitoring the good faith application of any discretion vested in such owners or developers with respect to the choice of tenants or purchasers of assisted units.

(h) Within thirty (30) days of the date the Implementation Office assumes its responsibilities, it shall prepare occupant pre-screening procedures and criteria and submit the same to the Court and parties for review. The parties shall then meet, within 15 days thereafter, with a representative of the Implementation Office to attempt to reach agreement on a final set of procedures and criteria. If such an agreement cannot be reached, the parties shall submit the matter to the Court for resolution.

Section 5. *Home Ownership to be Fostered.*

The Court finds that it is desirable to foster home ownership among the occupants of assisted housing units. Accordingly, the City shall endeavor to establish such Mandated Incentives as will tend to foster the production of assisted housing for sale and shall establish a program to apply available local, state and federal subsidies to the write-down of purchase costs by eligible purchasers of assisted housing units. Notwithstanding the fore-

going, no proposed housing development containing assisted units shall in any way be disfavored in negotiation with the City for a particular mix of Mandated Incentives, or be delayed or hampered in its applicable approval process. solely because it proposes to offer assisted housing units for rental rather than for sale.

Section 6. *Architectural Integration.*

Developers shall make no locational distinctions between assisted and other units, provided that for any building eight or more stories in height, the top two floors may be reserved for market rate units. Assisted units, whether for sale or rental, shall meet HUD minimum property standards with respect to square footage. Assisted units need not be furnished with each and every amenity as a developer may choose to include in a market rate unit.[2] The City shall foster (to the extent feasible) the use of such architectural and design devices as will minimize the visual impact of such housing developments on the surrounding community and any distinction between assisted and market units.

Section 7. *Staging.* Assisted units in any housing development shall obtain certificates of occupancy no later than according to the following schedule:

Percentage of Market Rate Units Receiving Certificates of Occupancy	**Percentage of Assisted Units Receiving Certificates of Occupancy**
Up to 25%	0% (none required)
25% + 1 unit	At least 10%
50%	At least 50%
75%	At least 75%
100%	100%

[2]Without limitation, the term "amenities" is intended to encompass items such as: custom-finished basements; fireplaces; customized kitchens; specialized finished, flooring, or fixtures, etc.

Section 8. *Mandated Incentives.* Consistent with Section 17 of the First Decree, the City shall provide appropriate Mandated Incentives to attract private development of assisted housing units. The type, extent and combination of necessary Mandated Incentives to be utilized with and given to a particular developer of multifamily housing may depend, among other things, on the allocation to specific income groups of assisted units which the developer (subject to the terms hereof) elects to make, the degree to which assisted financing may be available, prevailing economic and housing-market conditions, and the developer's business expectations. Accordingly, the City should be allowed discretion to establish with each developer of multifamily housing a mix of Mandated Incentives which would encourage construction, notwithstanding the financial burden associated with the inclusion of the required share of assisted units. However, the City shall exercise such discretion in good faith to encourage the timely attainment of the Goal. The examples set forth below illustrate the types of Mandatory Incentives which the City shall be prepared to implement:

Example 1. Increase the maximum permitted Height of a Building.

Example 2. Increase the maximum permitted Floor Area Ratio of a Building.

Example 3. Change the formulas set forth in Section 107-55 (B) of the Yonkers Code for the calculation of floor-area ratios for mixed-use buildings so as to lower the contribution of stories devoted exclusively to non-residential uses.

Example 4. Reduce the minimum permitted Lot Width or Lot Area for apartment houses.

Example 5. Reduce the minimum permitted Lot Area per family.

Example 6. Reduce the minimum permitted Rear Yard or minimum permitted Front Yard.

Example 7. Grant the owner of multifamily rental housing a full tax abatement on City real-estate taxes for the percent of units which are assisted but not to exceed 50 percent of the total number of units in the development including both assisted and non-assisted units. The benefits of the tax abatement to the non-assisted units are to be provided to the developer for use in further reducing the rental payments required of the assisted units so as to make them affordable within the defined rental limits.

Example 8. Vary the extent and/or duration of the incentive referred in Example 7 depending on the extent to which the owner elects to carry a larger than required share of assisted units allocated to households in an income group described in clauses (a) and/or (b) of Section 15 of the First Decree.

Example 9. Grant a tax abatement on City real-estate taxes to households buying assisted units. An additional tax abatement may be granted to up to 50 percent of the total number of units being constructed to be used to skew the monthly payments of the non-assisted units so as to further reduce the monthly payments required of the assisted units.

Example 10. Vary the extent and/or duration of the incentive referred to in Example 9 depending on the household's income level.

Example 11. Waive a portion of all application or processing fees which would otherwise be payable by developers seeking building-related approvals from the City.

Example 12. Grant a zoning overlay in (subject to the proviso in clause (d) of Section 17 in the First Decree) any district not zoned MG, M, A or BA.

Example 13. Cause funds in the AHTF to be applied (subject to applicable orders of this Court and HUD regulations) to site preparation or improvement at a site to be used for the construction of assisted units.

Example 14. Provide that, notwithstanding anything to the contrary contained in Chapter 107 of the Yonkers Code, a particular housing development may contain a certain number (or percentage) of units in excess of the number which would otherwise have been allowed by such Chapter.

Example 15. Cause the Industrial Development authority (to the extent it is within the power of the City to cause such result) to provide assisted financing for the construction or permanent financing of the portion of a housing project represented by assisted units.

Example 16. Vary the extent of the assisted financing referred to in Example 15 depending on the extent to which the owner or developer elects to carry or sell a larger than required share of assisted units allocated to households in an income group described in clauses (a) and/or (b) of Section 15 of the First Decree.

The foregoing examples embody the types of steps which (consistent with Section 17 of the First Decree) the City shall be prepared to take, as warranted, to realize the objective of attaining the Goal, as set forth herein and in the First Decree. The illustrations above do not require the City to offer a particular incentive (either as to type or extent) to any particular developer, housing development or owner. Nothing herein shall be interpreted to create in favor of a third party any right to obtain a particular incentive herein mentioned. However, in considering development proposals, the City shall act in a uniform, objective and non-arbitrary manner designed to afford all such proposals a fair opportunity to contribute appropriately to achievement of the Goal.

SECTION 9. *The Affordable Housing Trust Fund.*

The funds now and hereinafter placed in the AHTF as previously directed by this Court shall be expended (to the extent consistent with HUD statutes and regulations governing the application of CDBG funds) on (i) site-improvement projects (i.e.

site preparation, sewage works, roads, etc.) for sites on which multifamily housing projects containing assisted units are to be constructed and (ii) to directly assist in the acquisition of property through a Local Development Corporation's activities. In no event shall such funds be made available to private developers to defray construction or carrying costs for assisted units. Affordable Housing Trust funds may also be expended in manners otherwise consistent with HUD statutes and regulations if, in response to specific developer proposals, such other incentives will sufficiently obtain the overall objectives of the Long Term Plan. The City, therefore, shall have the right, upon obtaining Court approval, to use Affordable Housing Trust funds in other permissible manners.

SECTION 10. *Credit Against Goal.*

The City may provide (on a project-by-project basis, on an area-wide basis or otherwise) Mandated Incentives for the construction of assisted units in areas other than East and Northwest Yonkers. The City shall be given a credit of one unit of assisted housing towards the satisfaction of the assisted housing goals set forth in either clause (b) or (c) of Section 15 of the First Decree for every two units of assisted housing (allocated to households in the income group for which credit is claimed) constructed in such areas, up to a maximum credit of 100 units against each such goal. Such assisted units shall be subjected to the same occupancy, resale, architectural and other restrictions and requirements as assisted units constructed in East and Northwest Yonkers.

SECTION 11. *Expedited Review: Organizational Structure.*

(a) In addition to such other procedures as may be established to render the Mandated Incentives most effective, the City shall establish an expedited review process for housing projects containing assisted units to include priority scheduling and expedited review and negotiation of applicable Mandated Incentives.

(b) The City shall centralize in one administrative department, agency or office (the "Implementation Office") the administration of this long-term housing plan. The Implementation Office shall be a part of the Fair Housing Office created pursuant to this Court's May 26, 1986 Housing Remedy Order and shall be under the direction of the Executive Director of that Office. The responsibilities of such Office shall include acting as an ombudsman before all City agencies which may be involved in the process of approving multifamily housing developments and facilitating the expeditious completion (by such other agency, department or office as may be responsible therefor) of: all reviews and approvals, negotiations with specific developers and grants (if appropriate) of specific Mandated Incentives. Such Office shall also have the power to pre-approve or screen particular proposals, to assist developers in the application process, to implement a marketing program to make widely known the availability of Mandated Incentives and of assisted units among developers and potential purchasers and tenants of assisted units, and to implement such other administrative steps as may be required or convenient for the more effective realization of the objective of achieving the Goal (e.g. the creation of an advisory board of responsible citizens to assist in the foregoing task); provided that, the Implementation Office shall not exercise the power of other City agencies. Moreover, the administrative and coordinating functions described above shall not require that the City vest in the Implementation Office the final discretionary authority to approve specific projects or to grant specific Mandated Incentives.

(c) The Implementation Office shall remain in existence for the duration of this Decree. The Executive Director of the Fair Housing Office shall be responsible for formulating and presenting for approval and funding a budget for such Office, as well as for the hiring and firing of the employees of such Office.

SECTION 12. *"Section 8" Certificates.* The City shall consider in good faith any plans for assisting eligible families in

utilizing their "Section 8" certificates or vouchers which plaintiff or plaintiff-intervenors may at any time hereafter present to the City.

SECTION 13. As specific plans are formulated for the construction of affordable housing, projections for the additional number of school age children who would occupy Long Term Plan housing developments shall be furnished to the School Board. The School Board shall advise the Court and the parties as to the capacity of the existing school system to accommodate such additional children, whether expansion is required and the impact, if any, of such changes on the School Board's ability to comply with the Educational Improvement Plan.

SECTION 14. If at any time any party to this litigation believes that a proposal for the construction of housing is consistent with and furthers the objectives of the Housing Remedy Order and the Long Term Plan, but requires an exemption from some of the specific provisions contained herein, application may be made to the Court for a waiver or modification of such provisions with respect to that specific proposal.

SO ORDERED:

LEONARD B. SAND,
U. S. D. J.

DATE: 6/13/88

EXHIBIT E—Opinion of United States Court of Appeals for the Second Circuit, Dated August 26, 1988.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1679-1682—August Term 1987

Argued: August 17, 1988 Decided: August 26, 1988

Docket Nos. 88-6178, -6184, -6188, -6190

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—and—

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,

Plaintiffs-Intervenors-Appellees,

—v.—

CITY OF YONKERS,

Defendant-Contemnor-Appellant,

YONKERS BOARD OF EDUCATION and
YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

In the Matter of HENRY SPALLONE, PETER CHEMA, NICHOLAS LONGO, and EDWARD FAGAN,

Contemnors-Appellants.

Before:

NEWMAN, MINER, and MAHONEY,
Circuit Judges.

Appeals from orders of the District Court for the Southern District of New York (Leonard B. Sand, Judge) adjudicating the City of Yonkers and four council members in civil contempt and imposing coercive monetary sanctions for failure to comply with a court order implementing a consent judgment.

Affirmed as to the council members; affirmed, as modified, as to the City.

MICHAEL W. SCULNICK, New York, N.Y. (Stanley R. Strauss, Vedder, Price, Kaufman, Kammholz & Day, New York, N.Y.; Rex E. Lee, Carter G. Phillips, Sidley & Austin, Wash., D.C.; Paul W. Pickelle, Corp. Counsel, Yonkers, N.Y., on the brief), *for defendant-contemnor-appellant.*

ANTHONY J. MERCORELLA, New York, N.Y. (Vincent R. Fontana, James L. Fischer, Vincent R. Cappucci, Wilson, Elser, Moskowitz, Edelman & Dicker, New York, N.Y., on the brief), *for contemnor-appellant Spallone.*

JAMES D. HARMON, Jr., New York, N.Y. (Barry G. Saretsky, Martin S. Kaufman, Michael J. Eng, Aaron F. Fishbein, Bower & Gardner, New York, N.Y., on the brief), *for contemnor-appellant Chema.*

LAWRENCE R. SYKES, Yonkers, N.Y., *for contemnors-appellants Longo and Fagan.*

LINDA F. THOME, Dept. of Justice, Wash., D.C. (Wm. Bradford Reynolds, Asst. Atty. Gen., Mark R. Disler, Deputy Asst. Atty. Gen., David K. Flynn, Dept. of Justice, Wash., D.C., on the brief), *for plaintiff-appellee.*

MICHAEL H. SUSSMAN, Yonkers, N.Y. (Sussman & Sussman, Yonkers, N.Y., on the brief), *for plaintiffs-intervenors-appellees.*

JON O. NEWMAN, *Circuit Judge*:

This appeal presents important issues concerning the enforcement of orders of a United States District Court requiring action by a municipality to remedy violations of the Constitution and statutes of the United States. The principal issues are whether members of the Yonkers City Council may be required to vote to implement remedies contained in a consent judgment agreed to by the City and approved by the City Council, and whether the City, in addition to the council members, may be subjected to the coercive sanctions of civil contempt when the agreed upon legislative action has not been taken. The issues arise on

appeals by the City of Yonkers and four members of the Yonkers City Council from orders of the District Court for the Southern District of New York (Leonard B. Sand, Judge) adjudicating the City and the council members in civil contempt and imposing coercive sanctions. We conclude that under the circumstances of this case the recalcitrant council members may be required to vote to implement the consent judgment and that the City, in addition to the council members, may be adjudicated in contempt and subjected to coercive sanctions for failure to abide by the consent judgment and subsequent implementing orders of the District Court. We also conclude that the amount of the monetary sanctions imposed on the City, though properly substantial, should be somewhat reduced. We therefore affirm the order adjudicating the council members in contempt and affirm, as modified, the order adjudicating the City in contempt.

Background

1. The Underlying Lawsuit

The United States filed the underlying lawsuit on December 1, 1980, against the City of Yonkers, the Yonkers Community Development Agency, and the Yonkers Board of Education. The complaint made two basic allegations: (a) that the City and the Community Development Agency had "intentionally . . . perpetuated and seriously aggravated residential racial segregation" in violation of the Constitution and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619 (1982), and (b) that the racial segregation in the City's public schools had been "caused in substantial part by intentional, racially discriminatory acts and omissions" of the City and the Board of Education in violation of the Constitu-

tion. The National Association for the Advancement of Colored People (NAACP) was granted leave to intervene, and the suit was subsequently certified as a class action on behalf of all Black residents of Yonkers who currently reside in or are eligible to reside in publicly assisted housing or who are parents of children attending Yonkers public schools.

After a bench trial lasting ninety days over the course of fourteen months in 1983 and 1984, the District Court found the City and the Community Development Agency liable for intentional housing segregation and found the City and the Board of Education liable for intentional school segregation. *United States v. Yonkers Board of Education*, 624 F. Supp. 1276-1553 (S.D.N.Y. 1985). With respect to the housing violations, with which we are concerned on this appeal, the District Court found that the City had deliberately concentrated virtually all of its public and other subsidized housing in the southwest quadrant of Yonkers and had done so to maintain residential segregation. *Id.* at 1372-76. After conducting a six-day hearing as to appropriate remedies, the District Court issued a Housing Remedy Order on May 28, 1986. *United States v. Yonkers Board of Education*, 635 F. Supp. 1577 (S.D.N.Y. 1986).[1]

The Housing Remedy Order included provisions for the construction of 200 units of public housing and for the planning of additional units of subsidized housing. The City had previously agreed to provide acceptable sites for the 200 units of public housing as a condition of receiving its 1983 Community Development Block Grant from the

1 An order providing a remedy for the school segregation violation was issued May 13, 1986. *United States v. Yonkers Board of Education*, 635 F. Supp. 1538 (S.D.N.Y. 1986)

United States Department of Housing and Urban Development (HUD). Part IV of the Housing Remedy Order established a precise timetable within which the City was required to furnish HUD with necessary documents to secure HUD's approval of funds for the 200 units. *Id.* at 1580-81. The City was required to propose sites for 140 units within thirty days and sites for the remaining 60 units within ninety days.

Part VI of the Housing Remedy Order accorded the City broad discretion to make its own determinations concerning additional units of subsidized housing. The District Court did not specify the number of units to be built, the time by which they must be built, or the degree of subsidization. Part VI contained essentially two requirements. First, the additional units must be located in existing residential areas in east or northwest Yonkers. Second, the City must prepare a plan specifying, among other things, the number of subsidized units to be constructed or acquired, their location, and the rent levels or degree of subsidization. *Id.* at 1582. The City was given until November 15, 1986, nearly six months, to present its plan.

This Court affirmed the liability and remedy rulings of the District Court on December 28, 1987. *United States v. Yonkers Board of Education*, 837 F.2d 1181 (2d Cir. 1987), and the Supreme Court denied the City's petition for a writ of certiorari. 108 S. Ct. 2821 (1988). None of the requirements of the Housing Remedy Order was stayed during the course of appellate review.

2. Attempts to Implement the Housing Remedy Order

With respect to the requirement to propose sites for the 200 units of public housing within thirty and ninety days, the City totally defaulted. No site was proposed. With

respect to the requirement to submit a plan within six months for additional subsidized housing, the City again totally defaulted. On the appointed day, November 15, 1986, the City informed the District Court that it would not comply. The United States and the NAACP then moved for an adjudication of civil contempt and the imposition of coercive sanctions. Rather than proceed immediately to consideration of contempt sanctions, the District Court patiently endeavored to secure voluntary compliance. In February 1987 the City Council agreed to the appointment of an Outside Housing Advisor to identify sites for the 200 units of public housing and to draft a long-term plan for the additional units of subsidized housing. Throughout the rest of 1987 attention was focused primarily on the requirement for proceeding with the 200 units of public housing. The Advisor recommended placing the 200 units in small clusters on scattered sites. In April 1987 the City Council proposed to place the 200 units on twelve sites but rendered the proposal illusory by conditioning it on the patently unacceptable right of local civic associations to select the tenants. By the end of 1987 the City had taken no significant action to comply with the 1986 Housing Remedy Order.

In January 1988, following this Court's affirmance of the liability and remedy decisions and with the District Court contemplating designation of sites for the 200 units, the parties began negotiations to settle the compliance issues. On January 19, when prospects for agreement appeared bleak, the District Court pointed out to the City that the Court could proceed either by "deeming things to have been done which it was the obligation of Yonkers to do, or it can order Yonkers to do those things." On January 25, counsel for the City informed the Court that the City was contemplating a consent judgment and that the

City was prepared to designate seven sites for the 200 units of public housing and to implement a long-term plan to achieve the goal of 800 units of subsidized housing that had been recommended by the plaintiffs. A consent decree was agreed to by the parties that same day, approved by the City Council on January 27, and entered as a consent judgment of the District Court on January 28 ("the Consent Judgment").

With respect to the 200 units of public housing, the Consent Judgment renewed the City's commitment to build the units and identified seven specific sites. The judgment also committed the City to take specific steps within a prescribed timetable to have the 200 units built. Finally, the City pledged that it would not seek further review of the District Court's 1986 decision or any subsequently entered decree to the extent that such decrees relate to the 200 units.

With respect to the 800 units of subsidized housing, the Consent Judgment included several provisions, which are at the core of the pending appeal. First, the City acknowledged that the goal of 800 units was "an appropriate target in fulfilling its obligations pursuant to Part VI" of the Housing Remedy Order. Consent Judgment § 12. Next, the City pledged to make good-faith efforts to achieve 600 of the units in annual installments of 200 units within each of the next three years. *Id.* Next, and of special significance, the City agreed to adopt "legislation" on a number of topics to facilitate meeting the goal of 800 units of subsidized housing. *Id.* § 17. Among other things, the City agreed to adopt legislation granting necessary tax abatements, providing for zoning changes, and establishing, within ninety days, a package of incentives for local development. *Id.* § 17(b), (d), (e). Finally, the City agreed with

the other parties to work diligently to agree on various unresolved matters primarily concerning financial aspects of the 800 units and to submit a second consent decree to the Court by February 15, 1988. *Id.* § 18.

Rather than abide by the terms of the Consent Judgment, the City promptly attempted to disavow it. Citing intense community opposition to the Consent Judgment, especially the public housing provisions, the City moved on March 21, 1988, to delete the provision in which it had agreed not to seek further appellate review concerning the obligation to build the 200 units. To demonstrate the lengths to which it was prepared to go to be relieved of its public housing commitment, the City offered to return approximately $30 million of federal funds in the event the Supreme Court should set aside the public housing provisions of the Housing Remedy Order. The City's motion to amend the Consent Judgment was denied on March 31, and that ruling has not been appealed.

On April 12, at a chambers conference with the District Court, the City announced that it was "not interested" in completing negotiations on the terms of a long-term plan for the 800 units of subsidized housing, as required by section 18 of the Consent Judgment. In light of this development, the United States and the NAACP submitted to the Court on May 2 a proposed Long Term Plan Order based largely on a draft that had been prepared by the City's lawyers during the negotiations that had ensued prior to April 12. The City opposed the proposed order and noted specific objections. The District Court directed the plaintiffs to revise their proposed Long Term Plan Order in light of the City's objections. On June 13, following a hearing and further changes, the District Court entered the Long Term Plan Order. As revised by the parties and by

the Court, the Long Term Plan Order accommodated most of the City's objections. The Order provided considerable detail for the legislation that the City had committed itself to adopt in section 17 of the Consent Judgment.

By the time the Long Term Plan Order was entered, the City was one month in default on the obligation, agreed to in the Consent Judgment, to adopt implementing legislation. The United States therefore asked the Court to set a timetable for enactment of the legislation. On June 21 counsel for the City informed the Court that a consulting firm had been retained to draft the legislation and that City Council action could be anticipated at the next council meeting, perhaps in August. Concerned about the prospect of delay, a concern heightened by the City Council's adoption on June 14 of a resolution declaring a moratorium on all public housing in Yonkers, the District Court requested that the City Council pass a resolution adopting the provisions of the Long Term Plan Order. On June 28 the City Council voted against a resolution "indicating [the Council's] commitment to the implementation of" the Housing Remedy Order, the Consent Judgment, and the Long Term Plan Order.

The following day the District Court directed the plaintiffs to submit an order requiring the City to take "specific implementing action" under a prescribed timetable, violation of which would subject the City to contempt sanctions. In response to the plaintiffs' proposed order setting forth such a timetable, the City argued that the defeat of the resolution on June 28 indicated that the City would not voluntarily adopt legislation contemplated by the Long Term Plan Order and suggested that the Court itself should enter an order adopting the necessary legislation. At a hearing on the proposed timetable on July 12, the

District Court invited the parties' comments on the possible creation by the Court of an Affordable Housing Commission to exercise the City Council's functions concerning implementation of the housing remedy orders. The City opposed creation of the Commission because it would divest the Council of its "core legislative as well as executive functions."

3. The Prospect of Contempt

Prior to this point in the litigation, the District Court had on at least two occasions warned the City that it would face a contempt adjudication and coercive sanctions if it failed to abide by the Consent Judgment. On July 26 the District Court issued an order that gave the City one final opportunity to comply and detailed the precise consequences of continued noncompliance. The July 26 order required the City to enact by August 1 "the legislative package relating to the long-term plan as described in Section 17 of the [Consent Judgment] and the Long Term Plan Order." The "legislative package" was set forth in a detailed Affordable Housing Ordinance, which had been drafted by the City's consultants and marked as an exhibit at the July 26 hearing.

The July 26 order also established the schedule and consequences of civil contempt proceedings to occur in the event that the legislation was not adopted by August 1. If that occurred, the City and the council members were to show cause at 10:00 a.m., August 2, why they should not be adjudged in contempt. If such cause was not shown, each council member failing to vote for such legislation would be fined $500 per day, and, if the legislation was not passed by August 10, such council member would be imprisoned on August 11. The contempt sanction against the City would be daily fines starting at $100 on August 2

and doubling in amount each day of continued noncompliance. The cumulative total of the fines against the City would exceed $10,000 by day 7, exceed $1 million by day 14, exceed $200 million by day 21, and exceed $26 billion by day 28. The order provided that a council member could be purged of contempt by voting in favor of the legislation or by enactment of the legislation. The City could be purged of contempt by enactment of the legislation. The order further provided that all fines would be paid into the Treasury of the United States and would not be refundable, that the Council would meet at least once a week to vote on the legislative package, and that any incarcerated council member would be released to attend such meetings.

On July 28, the District Court informed all counsel by letter that the July 26 order "will be satisfied if the City Council, on or before August 1st, adopts a resolution committing itself to enact the Affordable Housing Ordinance within the minimum time prescribed for notice pursuant to state law." This letter responded to the City's expressed concern that state law specified notice and public hearing requirements in connection with enactment of zoning ordinances.

On August 1, the City Council met to consider a resolution expressing the Council's intent to adopt the Affordable Housing Ordinance within the minimum time prescribed by state law. The Council defeated the resolution by a vote of four to three.

4. The Contempt Adjudications

As contemplated by the July 26 order, the District Court held a hearing on August 2 to afford the City and the council members an opportunity to show cause why they

should not be adjudicated in civil contempt. Counsel for the City reported that the City Council had taken two actions the previous night. First, the Council had scheduled a public hearing for August 15, thereby giving the required state law notice of a hearing on a proposed zoning ordinance. Second, the Council had defeated the resolution of intent to adopt the Affordable Housing Ordinance. With respect to contempt, the City made essentially three points. First, counsel argued that the City was powerless to compel the dissenting council members to vote in favor of the Affordable Housing Ordinance. Second, he urged the Court to order the legislation into effect, rather than hold the City in contempt. Third, he pointed out that the fines were punitive since the escalating amount of the fines would place the City in bankruptcy in three weeks.

The District Court rejected these contentions. The Court noted that the City had failed to discharge its responsibilities to comply with the orders of the Court. The City had not applied to the Emergency Financial Control Board to take action or requested action by the Governor of New York. The Control Board was created to oversee Yonkers' financial condition and has an array of powers with respect to the City's financial affairs. 1984 N.Y. Laws ch. 103. Under the Yonkers City Charter, any elected officer may be removed from office by the Governor for "misconduct." Yonkers City Charter § C(2)-5. The Court was informed that the City had requested the Governor to use his "good offices" but had not requested him to "exercise powers and responsibilities he has as the governor of the state under the circumstances that now obtain." The Court also pointed out that by offering to have judgment of approximately $30 million entered against it as a means of avoiding its long-standing commit-

ment to build the 200 units of public housing, the City had "crossed the line of any form of fiscal or other governmental responsibility."

Concerning the suggestion that the Court, rather than the City, adopt the Affordable Housing Ordinance, the Court observed:

> [Th]ere does have to come a moment of truth, a moment of reckoning, a moment when the City of Yonkers seeks not to become the national symbol of defiance to civil rights and to heap shame upon shame upon itself, but to recognize its obligation to conform to the laws of the land and not step by step, order by order, but in the way in which any responsible community concerned about the welfare of its citizens functions. That is not going to be accomplished by this court adopting the ordinance.

Finally, the Court rejected the claim that the contempt sanctions were punitive:

> What could be more remedial and less punitive than a fine schedule that begins at $100 a day? $100 for the first day is not going to bankrupt Yonkers. $200 for the second day is not going to bankrupt Yonkers. The dire picture that you paint supposes: A that the contempt continues; and B that no other agency intervenes. As I have said on a number of occasions, this court is not the only entity which is bound by oath to protect and defend the constitution.

The Court held the City in contempt, imposed the coercive sanctions set forth in the July 26 order, and entered written findings of fact.

The District Court then considered the four council members who had voted against the resolution of intent to adopt the Affordable Housing Ordinance, Nicholas Longo, Edward Fagan, Peter Chema, and Henry Spallone. Counsel for Longo and Fagan requested an adjournment to familiarize himself with the case. The District Court denied the request, expressing the view that the council members had been on notice since July 26 of the prospect they faced and the need to have counsel. The Court stated that it would proceed with the contempt adjudication but would afford counsel the opportunity at a later time to be heard with respect to any theory or circumstance not available at this time. Counsel then asserted that his clients had not acted in bad faith and contended that they had opposed the resolution of intent because adoption of the Affordable Housing Ordinance would have violated state law requirements for notice and hearing of zoning changes. When the Court inquired whether counsel was representing that but for the claimed procedural defect, the council members would have voted for the resolution, no such assurance was given. Nor was such assurance given when Longo and Fagan each addressed the Court directly.

Counsel for Chema requested a two-week adjournment, which was denied. The District Court again stated its determination to proceed that day but afforded counsel the opportunity to reopen the matter thereafter. The Court also offered the opportunity for an immediate evidentiary hearing, which was declined. The Court then ascertained from Chema that he had received notice of the July 26 order and had voted against the resolution of intent the previous evening.

The District Court found Longo, Fagan, and Chema in contempt and imposed the sanctions set forth in the July

26 order. The Court also stated that, if any contemnor wished an evidentiary hearing, such request should be made by August 5 and that a hearing, if requested, would be held August 8. The Court again stated that "to obviate this question of state law and the dates contained in the state law provision" a vote in favor of a resolution of intent would constitute a purging of the contempt.

The fourth council member, Spallone, appeared without counsel and requested and was granted 24 hours to retain counsel. Spallone appeared with counsel at a hearing on August 4. At that time his counsel acknowledged that there was no factual issue in dispute. Counsel contended that his client could not be found in contempt because a legislator had an "unfettered" right to vote as he wishes. Counsel also urged that if the Court's order was violated, "it was done by the coun[ci]l corporate body per se." Finally, reversing the contention of the City, he urged the Court to "[p]unish the City of Yonkers, but don't punish my client."

The District Court found Spallone in contempt and made the finding retroactive to August 2.[2] By August 5 all four council members had informed the District Court that no evidentiary hearing was sought.

The District Court denied requests for stays by the City and the four council members. On August 9, after fines for seven days had become due, this Court stayed the contempt sanctions and ordered an expedited appeal. At the hearing of that appeal on August 17, the Court was informed that the public hearing noticed by the City Council on August 1 had been held on August 15. We were

2 Spallone has not challenged on appeal the retroactive aspects of the civil contempt sanction imposed upon him, and we decline to consider the issue *sua sponte*.

also informed that at the August 15 meeting the Council voted against the Affordable Housing Ordinance by a vote of four to three.

Discussion

A. The Council Members

1. Procedural Objections

The four council members contend that their contempt adjudications occurred without observance of the procedural protections of the Due Process Clause and those normally required for civil contempt proceedings. They contend that the proceedings were not initiated by orders to show cause, that they received inadequate notice of the charges, that their counsel were denied a reasonable time to prepare their defense, that issues concerning intent were not sufficiently explored, that the United States was not obliged to sustain its burden of proof, and that the judgments of contempt fail to identify the precise order violated.

A person charged with civil contempt is entitled to notice of the allegations, the right to counsel, and a hearing at which the plaintiff bears the burden of proof and the defendant has an opportunity to present a defense. *See In re Kitchen*, 706 F.2d 1266 (2d Cir. 1983); *In re Rosahn*, 671 F.2d 690 (2d Cir. 1982); *In re Di Bella*, 518 F.2d 955 (2d Cir. 1975); *see also* Rule 43(a) of the Rules of the Southern and Eastern Districts of New York.

With one exception, procedural requirements were fully observed. The order of July 26 served as a show cause order, giving the council members notice that in the event of a failure to comply with the requirements of that order, they would be obliged to show cause why they should not

be adjudicated in contempt for such failure. The order went even further than required by alerting the council members beforehand as to the precise sanctions that would be imposed in the event of noncompliance. Though the council members were not then defendants in the litigation, as officers of the defendant City, *see* N.Y. Pub. Off. Law § 2 (McKinney 1988), they were bound by that order and all of the injunction orders issued against the City, *see* Fed. R. Civ. P. 65(d), even without notice of them, *Dole Fresh Fruit Co. v. United Banana Co.*, 821 F.2d 106, 109 (2d Cir. 1987). In any event, the District Court required the City to post the July 26 order conspicuously, and none of the council members contends that he was not aware of its requirements.

Each council member appeared with counsel, and each was accorded an opportunity to present evidence and legal argument. The need for the plaintiffs to present evidence to sustain their burden of proof was obviated by the City's representation, undisputed by any of the four council members, that each had voted against the resolution of intention at the August 1 meeting of the City Council. As to the alleged lack of precision as to the precise order violated, the District Court's oral and written rulings specify that the council members are adjudged in contempt for violation of the July 26 order. Defendants contend that they are uncertain whether they have been cited for failing to vote in favor of the Affordable Housing Ordinance or for voting against the resolution of intention to adopt that ordinance. The action required of them by the July 26 order was to vote in favor of the Affordable Housing Ordinance. They failed to do so on August 1 and were found to be in contempt for that failure. The resolution of intention was a device offered by the District Court as a

means of satisfying the July 26 order while still observing the notice and hearing time requirements of state law. The vote against that resolution was clear evidence that the four council members were unwilling to obey the requirements of the July 26 order.

Of more substantial concern is the complaint that counsel were given inadequate time to present a defense. We are not persuaded by the District Court's point that the order of July 26 provided the council members time to retain counsel and time for counsel to become prepared in the event that noncompliance occurred on August 1. A council member is not obliged to retain counsel in advance of the occasion when his action may subject him to contempt, especially in the circumstances of this case, where the affirmative vote of any one of the four council members would have meant that none faced contempt.

We think it would have been preferable, even in the face of the protracted defiance demonstrated on this record, for the District Court to have accorded counsel at least a few days to prepare their defenses. Nevertheless, we see no basis for concluding that the promptness of the adjudications warrants setting them aside. None of the four contemnors sought the opportunity that was afforded them of pursuing an evidentiary hearing. There were no factual disputes to be resolved. Counsel were impaired, at most, in their ability to develop their contentions of law. Since, as will appear, we agree that all such contentions, now fully briefed and argued, are without merit, it would be idle to return the matter to the District Court to renew rulings that we are today holding were entirely correct.

2. Abuse of Discretion

In different ways the council members contend that the District Court exceeded its discretion in adjudicating them in contempt. One argument is that the Court on July 26 should not have directed the council members to vote for the Affordable Housing Ordinance once the Council had defeated an earlier resolution of intention on June 28. Another argument is that once the vote of August 1 occurred, the Court should not have adjudicated the council members in contempt. Underlying both arguments is the contention that a less confrontational resolution of the matter could have been achieved had the District Court selected the alternatives of either appointing a commission to exercise the Council's housing and related powers or ordering the Affordable Housing Ordinance into effect.

These arguments blend two somewhat different propositions of law, but in the end, both are unavailing. In challenging the District Court's decision to require the Council to enact the Affordable Housing Ordinance, the contemnors are alleging an abuse of discretion in the Court's choice of remedies for the constitutional violations adjudicated in 1986. As the contemnors point out, a District Court, though endowed with broad discretion in fashioning remedies for constitutional violations, *see Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), must exercise restraint in determining what actions ought to be required of state and local governmental officials. *See Rizzo v. Goode*, 423 U.S. 362, 380 (1976); *Toussaint v. McCarthy*, 801 F.2d 1080 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 2462 (1987); *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983). In challenging the District Court's decision to impose coercive contempt sanctions, the contemnors are alleging an

abuse of discretion in the Court's method of enforcing the remedy that had been selected. Though there is no question that courts have authority to enforce their lawful orders through civil contempt, *Shillitani v. United States*, 384 U.S. 364, 370 (1966), the contemnors properly point out that in selecting contempt sanctions, a court is obliged to use the " 'least possible power adequate to the end proposed.' " *Id.* at 371 (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 61, 69 (1821)).

In this case, however, there is a fundamental reason why the choice of implementing legislation as a remedy and the choice of coercive contempt sanctions to enforce compliance with that remedy cannot possibly be an abuse of the District Court's discretion. That reason is the blunt fact that the City agreed in the Consent Judgment to comply with the Housing Remedy Order by the adoption of necessary implementing legislation, specifically including tax abatements and zoning changes. By its approval of the Consent Judgment the City Council itself selected the remedy of implementing legislation and cannot complain that the District Court approved the agreement. Moreover, once committed by its own agreement to adopting implementing legislation, the Council cannot complain that its obligation is enforced by the coercive sanctions of civil contempt. Consent judgments are important devices for resolving difficult controversies. Their effectiveness depends on the ability of all concerned to rely on the enforcement of their terms. In the context of a consent judgment, use of civil contempt sanctions is the "least possible power *adequate* to the end proposed" because faithful performance of the agreement is precisely the end proposed.

To the extent that the council members are contending that the District Court exceeded its discretion in ordering

them to adopt the precise terms of the Affordable Housing Ordinance, this argument also is unavailing. The Consent Judgment had obliged the City not only to enact implementing legislation but to furnish within three weeks a long-term plan spelling out the details on matters left unresolved in the consent judgment. Upon the City's default of that obligation, the District Court was fully entitled to proceed with efforts to formulate a long-term plan. The Court proceeded cautiously, according the City a full opportunity to draft the plan and ultimately accepting nearly everything that the City proposed. Similarly, with the specifics of the Affordable Housing Ordinance, the District Court afforded the City the opportunity to have its consultants draft the ordinance and accepted the draft they produced. By ordering passage of the Affordable Housing Ordinance, the District Court was carrying out the terms of the Consent Judgment under which the City agreed to adopt implementing legislation on tax abatements and zoning changes and doing so with details supplied by the City itself. The order of July 26 was well within the discretion of the District Court, as was its decision to enforce that order by civil contempt sanctions.

3. State Law Objection

Council member Chema contends that the order of July 26 cannot be enforced by contempt sanctions because it violates state law requiring notice and hearing of proposed changes in zoning ordinances. N.Y. Gen. City Law § 83 (McKinney 1968). The argument is unavailing. In the first place, the supremacy of federal law, including federal court orders to implement remedies for federal constitutional and statutory violations, prevails over conflicting state laws. *See Cooper v. Aaron*, 358 U.S. 1 (1958). Moreover, the District Court made clear in its letter to counsel

of July 28 that the order of July 26 would be satisfied if the Council "adopts a resolution committing itself to enact the Affordable Housing Ordinance within the minimum time prescribed for notice pursuant to state law." This alternative means of compliance with the July 26 order was reiterated in the August 2 hearing at which the council members were adjudicated in contempt.

It may be contended that by requiring a resolution of intention by August 1, prior to the August 15 hearing on the Ordinance, the District court was observing the notice requirement of state law but overriding the substance of the hearing requirement by ordering the Council to commit itself to an Ordinance before it had the benefit of input from the public. We do not understand the District Court to have simultaneously permitted time for the public hearing and also precluded consideration of its results. Obviously, the basic issue of adopting an ordinance that implemented the Housing Remedy Order, the Consent Judgment, and the Long Term Plan Order had been determined and would not be open for reconsideration as a result of the public hearing. To that extent, the state law hearing requirement was properly overridden by paramount federal law. But there is no reason to believe that the District Court intended to bar consideration by the Council of useful suggestions tendered at the public hearing that might improve specific provisions of the Affordable Housing Ordinance. The hearing would still be useful to the extent that it generated suggestions not inconsistent with achieving the basic objectives of the remedial orders that had been entered. The Council has at all times been free to seek modification of the terms of the proposed ordinance, which the City's consultants drafted, but no such request has been made. Finally, we note that after the public hearing was held on August 15, the four individual

contemnors again voted against the Affordable Housing Ordinance.

4. Legislative Immunity

The major defense asserted by the council members is that they are entitled to legislative immunity and that such immunity prohibits a district court from compelling them to vote in favor of a particular ordinance. There is no doubt that state legislators enjoy immunity when engaged "in the sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); *see Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 731-23 (1980). The Supreme Court has extended such immunity to "regional legislators," *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), but has expressly left open the question whether such immunity extends to "individuals performing legislative functions at the purely local level," *id.* at 404 n.26. Prior to *Lake Country Estates*, a number of circuits had denied immunity to local legislative officials, *see Williams v. Anderson*, 562 F.2d 1081, 1101 (8th Cir. 1977) (school board members); *Jones v. Diamond*, 519 F.2d 1090, 1101 (5th Cir. 1975) (county supervisors); *Curry v. Gillette*, 461 F.2d 1003, 1005 (6th Cir.) (aldermen), *cert. denied*, 409 U.S. 1042 (1972); *Progress Development Corp. v. Mitchell*, 286 F.2d 222, 231 (7th Cir. 1961) (village board of trustees); *Cobb v. City of Malden*, 202 F.2d 701, 706-07 (1st Cir. 1953) (Magruder, C.J., concurring) (city councilmen), but after the Supreme Court extended immunity to regional legislators, seven circuits ruled that similar immunity is available to local legislators, *see Aitchison v. Raffiani*, 708 F.2d 96, 98-100 (3d Cir. 1983); *Reed v. Village of Shorewood*, 704 F.2d 943, 952-53 (7th Cir. 1983); *Espanola Way Corp. v. Meyerson*,

690 F.2d 827 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349-50 (9th Cir. 1982); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193-94 (5th Cir. Unit A 1981), *cert. denied*, 445 U.S. 907 (1982); *Bruce v. Riddle*, 631 F.2d 272 (4th Cir. 1980); *Gorman Towers v. Bogoslavsky*, 626 F.2d 607, 611-14 (8th Cir. 1980).

Even if we assume for purposes of this appeal that city council members enjoy the same immunity available to state legislators, we would seriously doubt that such immunity insulates them from district court orders requiring them to comply with remedial decrees redressing constitutional violations. The Supreme Court has instructed a district court that, if necessary to secure compliance with a prior federal court remedial decree, it could order county legislators "to exercise the power that is theirs to levy taxes" to reopen the public schools of Prince Edward County, Virginia. *Griffin v. County School Board*, 377 U.S. 218, 233 (1964). Though appellants minimize the force of this instruction by calling it dictum, since the need to issue such an order had not then arisen, it is especially forceful dictum when the Supreme Court specifically informs a district court what action it may take in the course of significant litigation. If it had become necessary to order the county legislators to levy taxes, there can be no doubt that the Supreme Court expected the district court to make sure that its order was enforced.

The Supreme Court has also upheld a district court's remedial order that required state and local officials to provide necessary public funds to implement a school desegregation plan. *Milliken v. Bradley*, 433 U.S. 267 (1977). In *Milliken* the Court expressly rejected an immunity defense based on Eleventh Amendment sovereign

immunity—a claim at least as substantial as the immunity defense now asserted by the four council members. The Court pointed out that though a state enjoyed immunity from damage actions, its immunity did not insulate it from a district court judgment requiring prospective action to comply with constitutional requirements, even when compliance would have "a direct and substantial impact on the state treasury." *Id.* at 289. *See also Edelman v. Jordan*, 415 U.S. 651 (1974). This Court has also approved an order of a district court compelling a city's legislative body to vote in favor of funds required to secure compliance with court-ordered remedies for constitutional violations. *Arthur v. Nyquist*, 712 F.2d 809 (2d Cir. 1983), *cert. denied*, 466 U.S. 936 (1984). *See also United States v. City of Parma, Ohio*, 661 F.2d 562 (6th Cir. 1981) (requiring enactment of city ordinance), *cert. denied*, 456 U.S. 926 (1982).

Indeed, in one of the cases cited to us in support of legislative immunity, *Star Distributors, Ltd. v. Marino*, 613 F.2d 4 (2d Cir. 1980), we expressly distinguished litigation in which a state legislature had been enjoined "from continuing its defiance of federal court desegregation orders." *Id.* at 10 (citing *Bush v. Orleans Parish School Board*, 191 F. Supp. 871 (E.D. La.) (three-judge court), *aff'd sub nom. Denny v. Bush*, 367 U.S. 908 (1961)). The three-judge court in *Bush* had rejected the defense of legislative immunity on the ground that the Louisiana legislature was acting in an administrative capacity, *see Bush v. Orleans Parish School Board*, 188 F. Supp. 916, 922 (E.D. La. 1960) (three-judge court), *aff'd*, 365 U.S. 569 (1961), but our discussion of the *Bush* litigation in *Star Distributors* makes it clear that we did not consider legislative immunity to be a defense to orders issued "to vindicate the authority of a federal court." 613 F.2d at 10.

On this appeal, however, we need not definitively decide whether as a general matter a district court may order city council members to vote in favor of a particular ordinance, even to implement remedies for constitutional violations. This appeal presents the more narrow issue whether such an order may be entered and enforced by contempt sanctions after a city has agreed to entry of a consent judgment committing itself to enact implementing ordinances and a city's legislative body has voted in favor of such a consent decree. On that narrow issue, we have no doubt that federal court authority must prevail. No litigant, least of all public officials sworn to uphold the Constitution of the United States, may be permitted to avoid compliance with solemn commitments they have made in a consent judgment entered by a federal district court to remedy constitutional violations. Without intending to cast doubt on a district court's authority to order legislative action in contested litigation concerning the appropriate choice of remedies for constitutional violations, we note that the Supreme Court has recently observed that consent judgments may contain enforceable obligations that might have been beyond the authority of a district court to enter in contested litigation. *See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986).

Nor is there any merit in appellant Spallone's suggestion that he may not be required to implement the Consent Judgment because he voted against its approval as a member of the City Council. A federal court must be able to rely upon the assurances given by municipalities and their legislative bodies, without regard to the dissenting votes of individual local officials. Once the Yonkers City Council approved the terms of the Consent Judgment, the Council became obligated to carrying out its commitments. If a

member of the Council is unwilling to abide by such commitments, his option is to decline to serve on the body that is bound, not to act in defiant disregard of the commitments and the federal court judgment that memorializes them.

Whatever the scope of local legislators' immunity, it does not insulate them from compliance with a consent judgment to which their city has agreed and which has been approved by their legislative body.

5. First Amendment

The council members' assertion of a First Amendment defense to the July 26 order and its enforcement requires no extended discussion. Even if we acknowledge that the act of voting has sufficient expressive content to be accorded some First Amendment protection as symbolic speech, the public interest in obtaining compliance with federal court judgments that remedy constitutional violations unquestionably justifies whatever burden on expression has occurred. *See United States v. O'Brien*, 391 U.S. 367 (1968). The council members remain free to express their views on all aspects of housing in Yonkers. But just as the First Amendment would not permit them to incite violation of federal law, *see Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); *Dennis v. United States*, 341 U.S. 494 (1951), it does not permit them to take action in violation of such law.

B. The City

To the extent that the City advances the same objections as the council members, particularly the contention that the District Court should have chosen to adopt the Affor-

dable Housing Ordinance itself or to appoint a commission to exercise the City's housing functions, we need not repeat our reasons for rejecting those objections. Three contentions, however, require further discussion.

1. Defense of Impossibility

The claim most vigorously pressed by the City is the defense of impossibility. The City contends that enactment of the Affordable Housing Ordinance requires an affirmative vote of a majority of the City Council and that the City, as a corporate entity, is powerless to compel the council members to act. We recognize that civil contempt sanctions may not be imposed upon a person or entity unable to comply with a court's orders. *See Shillitani v. United States, supra*, 384 U.S. at 371; *Maggio v. Zeitz*, 333 U.S. 56, 76 (1948). Nevertheless, we conclude that the City's defense of impossibility is unavailing.

Preliminarily, we have some doubt whether the City has done everything it can, apart from securing the favorable votes of a Council majority, to obtain compliance with the orders of the District Court. The City has not requested the Governor of New York to use whatever authority he may have to remove local officials for misconduct, nor has the City requested the New York Emergency Financial Control Board for the City of Yonkers to take whatever action its broad authorizing statute permits it to take under the current circumstances, 1984 N.Y. Laws ch. 103.

More fundamentally, we agree with the position urged by the United States that the City cannot view itself as an entity separate from the City Council for purposes of complying with the Consent Judgment. The City bound itself to take necessary legislative action when it agreed to the Consent Judgment, which explicitly calls for implement-

ing legislation. Having made that commitment, the City may properly be subjected to the coercive force of civil contempt sanctions until compliance with its commitment occurs. The suggestion that the administrative officials of the City are willing to comply but cannot take legislative action conjures up a scheme of separated powers that does not obtain in Yonkers. For purposes of taking official governmental action, the City of Yonkers is the City Council and vice versa. The Council sets municipal policy, *see Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986) ("where action is directed by those who establish governmental policy, the municipality is equally responsible" with city's authorized decisionmakers), it appoints and can replace the city manager, and it is the principal agency of governance for the City. There is not even a separately elected executive authority. The mayor is a council member elected to the Council in a citywide election; the other council members are elected from districts. Under the circumstances of this case, the Council's defiance of the Consent Judgment and the implementing orders of the District Court is the defiance of the City, and the City, along with the defiant council members, may be subject to civil contempt sanctions. As the Supreme Court has observed, "If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance." *Hutto v. Finney*, 437 U.S. 678, 691 (1978). The same may be said of a city.

The City further contends that even if it can legally be held in civil contempt because of the violation of the July 26 order, it was an abuse of discretion to do so under the circumstances here presented, especially since the District Court had available the alternative of ordering the Affordable Housing Ordinance into effect. We conclude, however, that the District Court neither erred as a matter of

law nor exceeded its permissible discretion by using contempt sanctions to coerce the City to fulfill commitments that it had undertaken in the Consent Judgment or by determining that such sanctions were necessary to achieve enactment of the Ordinance.

2. State Law Objection

The City asserts a state law objection different from the council members' claim concerning notice and hearing requirements for zoning changes. The City contends that it lacks the authority under state law to grant the tax abatements required by the Long Term Plan Order. It acknowledges some authority to grant tax abatements, *see* N.Y. Real Prop. Tax Law § 421-c (McKinney 1984), but contends that the Long Term Plan Order requires tax abatements permissible only for cities of more than one million population, *id.* § 421-a(2)(a).

We cannot be certain whether the District Court, in issuing the Long Term Plan Order, intended to override state law in the belief that the specified tax abatements were necessary to remedy the violations that have occurred or intended to require only those tax abatements consistent with state law. The Court clearly had the power to override state law to implement its judgment, but we are not certain that it intended to use such power. We need not resolve the uncertainty at this time, however, because the City's challenge is to the provisions of the Long Term Plan Order, not the Affordable Housing Ordinance, which is the subject of the pending contempt adjudication. The Ordinance refers to tax abatements but does not implement them. *See* proposed Affordable Housing Ordinance § 2(a) n.*. Under the circumstances, we will not disturb the contempt adjudication but will grant leave to the City to seek clarification from the District Court whether it

intends to order tax abatements that override state law or only such abatements as are consistent with state law.

3. The Amount of the Monetary Sanctions

The City contends that the amount of the coercive fines imposed as a remedial sanction for civil contempt is excessive and a violation of the Due Process Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment. The fines start at $100 a day and double each day of continued noncompliance. As a result of doubling, the fine exceeds $100,000 for day 15, exceeds $1 million for day 21, and exceeds $1 billion for day 25.

The Supreme Court has stated that the Eighth Amendment is "designed to protect those convicted of crimes." *Ingraham v. Wright*, 430 U.S. 651, 664 (1977). More recently the Court has raised the possibility that the Amendment might have some application beyond the criminal context; the Court characterized as a "cognizable constitutional challenge" a claim that the Excessive Fines Clause applies to the amount of punitive damages that may be awarded in civil cases, *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1650 (1988), but declined to decide the issue because it had not been preserved for review as a federal question, *id.*

Even if the Excessive Fines Clause should be determined to apply to punitive damages, it does not apply to civil contempt sanctions imposed to obtain compliance with court orders. We have already held that the Cruel and Unusual Punishments Clause does not apply to coercive imprisonment imposed as a civil contempt sanction, *United States v. Dien*, 598 F.2d 743, 745 (2d Cir. 1979), and the reasoning of *Dien* applies to the Excessive Fines Clause. Both clauses apply to sanctions imposed to punish

past conduct, not to sanctions imposed to secure prospective compliance.

The inapplicability of the Excessive Fines Clause, however, does not mean that civil contempt sanctions are subject to no limitation. The Due Process Clause is an arguable limitation, though it is debatable whether a person has been "deprived" of property within the meaning of the Fifth Amendment when that person always has the option of complying with the order of the court and thereby terminating the obligation to pay the coercive fine. In any event, the law of contempt itself exerts some outer limits on the normally "wide discretion" of a district court to fashion appropriate remedies to secure compliance with its lawful orders. *See Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979). *See also Perfect Fit Industries, Inc. v. Acme Quilting Co.*, 673 F.2d 53, 57 (2d Cir.) (level of corporate profits relevant in determining whether coercive fine is "confiscatory"), *cert. denied*, 459 U.S. 832 (1982).

The fact that a coercive monetary sanction requires payment of a large daily fine does not necessarily render that sanction beyond the discretion of a district court. The Supreme Court has itself selected as an appropriate sanction a coercive fine of $2,800,000 (in 1947 dollars) to be imposed upon a union if it should fail to comply with a district court order within five days. *United States v. United Mine Workers*, 330 U.S. 258, 305 (1947). We have declined to disturb by mandamus the imposition of a coercive fine that started and remained constant at the level of $150,000 per day. *International Business Machines Corp. v. United States*, 493 F.2d 112 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974).

The City of Yonkers has an annual budget of $337 million. The need for a substantial daily fine to coerce compliance is demonstrated by the City's announcement to the District Court of its willingness to pay $30 million to be relieved of its commitment to build the 200 units of public housing. Obviously, the City believes that there is a price it is willing to pay to avoid compliance with the orders of the District Court. The District Court was entitled to establish a schedule of fines that would secure compliance with its orders, and under the circumstances of this case that schedule would have to reach, without undue delay, a cumulative fine significantly above the price the City was willing to pay for noncompliance. The Court acted well within its discretion in starting the fine schedule at $100 a day. The Court also was entitled within reasonable limits to double the amount of the fine for each day of continued defiance. At that rate the cumulative fine after seven days, when we issued our stay, was $12,700. At some point, however, the doubling reaches unreasonable proportions. Under the current schedule the fine for day 25 is more than $1 billion; the fine for day 30 is more than $50 billion.

We believe that the doubling exceeds the bounds of the District Court's discretion when the level of each day's fine exceeds $1 million. The present schedule calls for a fine of more than $800,000 on day 14. We will therefore modify the contempt sanction against the City to provide that the fine shall be $1 million per day on day 15 and $1 million per day for every subsequent day of noncompliance.

Conclusion

We affirm the contempt sanctions against the four council members, Spallone, Chema, Longo, and Fagan.

We modify the contempt sanction against the City of Yonkers so that the fine is $1 million per day on day 15 and $1 million per day for every subsequent day of noncompliance, and we affirm the sanctions against the City, as modified. We deny the pending motion to stay the District Court's order of July 26. We direct that issuance of our mandate be stayed for seven days from the date of this decision to permit application to the Supreme Court or a Justice thereof for a stay of the contempt sanctions pending filing and consideration of a petition for a writ of certiorari. Unless a stay is granted by the Supreme Court or a Justice thereof, our mandate shall issue seven days from the date of this decision and our prior stay of the contempt sanctions shall at that time be vacated. On the date our mandate issues, the fines against each of the four council members shall resume at the level of $500 per day and, if noncompliance continues, each shall be imprisoned, pursuant to paragraph 5 of the Order of July 26, two days after the date our mandate issues. Since our stay entered on August 9 and the District Court's Order directed imprisonment to occur on August 11, it is appropriate to adjust the incarceration timetable in light of the interval between the issuance of our stay and the vacation of that stay upon issuance of our mandate. Also on the date our mandate issues, the fines against the City shall resume at the level for day 8 of the schedule resulting from the District Court's Order of July 26 and, if noncompliance continues, shall double until day 14, shall be $1 million on day 15, and shall be $1 million per day for every subsequent day of noncompliance.

Affirmed as to the council members; affirmed, as modified, as to the City.

EXHIBIT F—Order of Hon. Leonard B. Sand, U.S.D.J., Dated August 3, 1988.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES, *et al.*,

Plaintiffs,

against

YONKERS BOARD OF EDUCATION, *et al.*,

Defendants.

80 Civ. 6761 (LBS)

RULE

On August 2, 1988, this Court entered an order adjudging Peter Chema in civil contempt for the reasons stated therein.

In addition, it is hereby ordered that the application of Peter Chema for a stay of the order of contempt and the imposition of sanctions is hereby denied.

SO ORDERED:

Dated: New York, New York
August 3, 1988

LEONARD B. SAND
United States District Judge
8/4/88

(Stamped):
U. S. District Court
Filed Aug. 4, 1988
S. D. of N. Y.

EXHIBIT G—Order of Hon. Leonard B. Sand, U.S.D.J., Dated August 2, 1988, Adjudicating City of Yonkers in Civil Contempt.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH—NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Plaintiffs-Interveners,

v.

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

80 Civ. 6761 (LBS)

ORDER ADJUDICATING CITY OF YONKERS IN CIVIL CONTEMPT

ORDER

SAND, J.

On July 26, 1988, this Court entered an Order requiring the City of Yonkers pass on or before August 1, 1988, the legislative package relating to the long term plan as described in Section 17 of the First Remedial Consent Decree in Equity dated January 28, 1988, and the Long-Term Plan dated June 13,

1988 ("Affordable Housing Ordinance"). Following entry of that Order, counsel for the City raised a number of questions as to the applicability of state law requirements relating to amendments to the City zoning ordinance. Rather than deal with any question of federal predemption, this Court notified counsel for the City and the Plaintiffs by letter dated July 28, 1988, that compliance with its July 26th Order could be met by adoption by the City Council of a resolution committing the City to enact the Affordable Housing Ordinance within the minimum time prescribed for notice pursuant to state law.

The July 26th Order further provided that upon the City's failure to enact the legislative package as required, the City and its individual city council members would be required to show cause at a hearing on August 2nd as to why they should not be held in civil contempt of the July 26th Order.

At the hearing held on August 2, 1988, counsel for the City advised that on August 1st, the City Council, by a vote 4-3, refused to adopt the required resolution. Members of the city council voting against the resolution were identified as Vice-Mayor Henry Spallone, Majority Leader Nicholas Longo, Edward Fagan and Peter Chema. At the hearing, the City was given ample opportunity to show cause why it should not be held in civil contempt of this Court's July 26, 1988 Order. Having considered the arguments of all parties, this Court finds as follows as to the City of Yonkers:

1. The City received adequate notice as to its duty under the July 26th Order;

2. At the hearing on August 2, 1988, the City had adequate opportunity to be heard; and

3. The City had the ability to comply and a full understanding of the consequences of non-compliance.

Accordingly, the City of Yonkers is adjudged in civil contempt of this Court's July 26, 1988 Order. The Court notes that this action is but the latest in a series of contempts of this

Court's prior Orders. However, this contempt is the most immediate and clearly drawn.

In so finding, this Court rejects that City's contention that a dichotomy can be drawn between the City and its council members through which it acts.

Therefore, it is hereby ORDERED that:

1. Until such time that the City has purged itself of contempt by enacting the Affordable Housing Ordinance or a resolution of intent to adopt the same, the City shall be subject to daily fines as set forth in Paragraph 3 of the July 26, 1988 Order. The first check is due and payable by 4:30 p.m. on August 3, 1988.

2. If at some later point, the City purges itself of contempt and then resumes its contumacious conduct, the level of fines to be imposed for such renewed contumacy shall begin at the level at which the fines had previously ceased; and

3. The City may apply in this Court at any time for relief from this Order based upon a showing of changed circumstances warranting such relief.

It is further ORDERED that the City's application for a stay of this Order is DENIED.

SO ORDERED

DATED: August 2, 1988
New York, New York

LEONARD B. SAND
United States District Judge

(Stamped):
Illegible

EXHIBIT H—Decision of United States Supreme Court Dated September 1, 1988, on Application for a Stay.

SUPREME COURT OF THE UNITED STATES

Nos. A-172, A-173, A-174, AND A-175

HENRY G. SPALLONE
A-172 v.
UNITED STATES ET AL.

NICHOLAS LONGO AND EDWARD FAGAN
A-173 v.
UNITED STATES ET AL.

PETER CHEMA
A-174 v.
UNITED STATES ET AL.

CITY OF YONKERS
A-175 v.
UNITED STATES ET AL.

ON APPLICATIONS FOR STAY

[September 1, 1988]

The applications for stay of Henry G. Spallone, Nicholas Longo, Edward Fagan, and Peter Chema presented to JUSTICE MARSHALL and by him referred to the Court are granted pending the timely filing and disposition by this Court of petitions for writs of certiorari.

The application for stay of the City of Yonkers presented to JUSTICE MARSHALL and by him referred to the Court is denied.

JUSTICE MARSHALL, joined by JUSTICE BRENNAN, concurring in the denial of stay in A-175, dissenting from the grant of stay in A-172, A-173, and A-174.

On August 26, 1988, the Court of Appeals for the Second Circuit upheld both the District Court's determination that

were in contempt of court and its imposition of sanctions for their failure to abide by a consent decree committing the City to implement a housing desegregation plan. The Court of Appeals stayed issuance of its mandate until September 2, to permit application for a stay of the contempt sanctions pending filing and consideration of petitions for writs of certiorari. The City of Yonkers and the four councilmembers have sought such a stay. Today the Court denies a stay as to the City but grants it as to the four councilmembers. I believe that the Court should deny the stay as to the councilmembers as well.

I

In 1980, the United States filed suit against the City of Yonkers, claiming it had intentionally perpetuated and aggravated residential racial segregation in violation of the Constitution and Title VIII of the Civil Rights Act of 1968, 42 U. S. C. §§3601–3619 (1982), and had intentionally segregated its schools in violation of the Constitution. The National Association for the Advancement of Colored People (NAACP) was accorded plaintiff-intervenor status. In 1985, the District Court held the City liable for intentional housing and school segregation, *United States* v. *Yonkers Board of Education*, 624 F. Supp. 1276 (S. D. N. Y. 1985), finding *inter alia* that the City had deliberately concentrated virtually all of its public and subsidized housing in southwest Yonkers in order to maintain residential segregation. The District Court issued a Housing Remedy Order which directed the City to establish a fair housing policy, to construct 200 units of public housing and to plan additional units of subsidized housing. The Court of Appeals for the Second Circuit affirmed both the liability and remedy rulings, *United States* v. *Yonkers Board of Education*, 837 F. 2d 1181 (2d Cir. 1987), and the Court denied the City's petition for a writ of certiorari. 108 S. Ct. 2821 (1988).

On November 15, 1988, the City informed the District Court that it would not comply with the Housing Remedy

Order. The United States and the NAACP moved for an adjudication of civil contempt and the imposition of coercive sanctions, but the District Court instead sought voluntary compliance with its earlier order. After negotiations, the City Council—the City's sole governing authority—agreed to appoint an Outside Housing Advisor to identify sites for the 200 units of public housing and to draft a long-term plan for subsidized housing. Over a year passed. On January 28, 1988, the parties entered into a consent decree, approved by the District Court, which set a new timetable for the construction of the 200 public housing units. The City pledged that it would not seek further review of the Housing Remedy Order or any subsequently entered decree relating to these 200 units. In addition, the City agreed that the construction of 800 units of subsidized housing was an appropriate remedy and pledged to make good-faith efforts to build the additional 600 units within the next three years. Section 17 of the consent decree obligated the City "to adopt . . . legislation" necessary to meet the goal of 800 units, including tax abatements, zoning changes, and, within ninety days, a package of incentives for local development. Section 18 provided for further negotiations and the submission of a draft of a second consent decree setting forth long-range plans for subsidized housing by February 15, 1988. The Council approved the consent decree by a vote of 5 to 2.

Within two months, the City demonstrated its unwillingness to comply with the consent decree by moving unsuccessfully to delete the provision in which it promised not to seek further review of its obligation to build the 200 units, and by offering to return approximately $30 million in federal funds in the event this Court set aside the public housing provisions of the Housing Remedy Order. On April 12, 1988, the City announced that it was "not interested" in completing negotiations on the long-term plan for subsidized housing as required by section 18 of the consent decree. Following a hearing on June 13, the District Court entered a Long Term Plan Order

outlining the legislation that the City had committed itself to adopt in section 17 of the consent decree. The order was based on a draft prepared by the City's lawyers during earlier negotiations and accommodated most of the City's objections.

The next day, June 14, 1988, the Council adopted a resolution declaring a moratorium on all public housing construction in Yonkers. A week later, on June 21, the City announced that it had retained a consulting firm to draft housing legislation, and that the next Council meeting was tentatively scheduled for August. The District Court, expressing concern about delay, asked the Council to pass a resolution adopting the provisions of the Long Term Plan Order. On June 28, the Council voted down a resolution indicating its commitment to implementing the Housing Remedy Order, the consent decree, and the Long Term Plan Order. The following day, the District Court directed the plaintiffs to submit an order requiring the City to take "specific implementing action" under a prescribed timetable on penalty of a contempt adjudication and imposition of fines. At a hearing held to consider the proposed order, the City stated that it would not voluntarily comply with the Long Term Plan Order and urged the Court to enter an order adopting the necessary legislation. The City also objected to the creation of an Affordable Housing Commission to exercise the Council's responsibilities for implementing the District Court's orders and the consent decree. The City argued that such a Commission would impermissibly interfere with the Council's "core legislative and executive functions."

On July 26, 1988, the District Court ordered the City to enact by August 1 "the legislative package relating to the long-term plan as described in Section 17 of the [consent decree] and the Long Term Plan Order." This "legislative package" was set forth in a detailed Affordable Housing Ordinance drafted by the City's consultants. The July 26 order warned that if the legislation were not adopted by August 1,

the City and the councilmembers would face contempt adjudication and the following fines: on the City, a fine starting at $100 on August 1 and doubling every day until the legislation was passed, so that the cumulative total of the fines would exceed $10,000 by day 7, $1 million by day 14, $200 million by day 21 and $26 billion by day 28; on the councilmembers, a fine of $500 per day on each member who voted against the legislative package, with the additional threat of incarceration on August 10 if the package were not adopted by the Council by that time. To accommodate the City's expressed concern that it could not adopt legislation by August 1 without running afoul of state notice and hearing requirements, the District Court specified that its July 26 order would be "satisfied if the City Council, on or before August 1, adopts a resolution committing itself to enact the Affordable Housing Ordinance within the minimum time prescribed for notice pursuant to state law." On August 1, the Council rejected such a resolution by a vote of four to three.

As contemplated by the July 26 order, the District Court held a hearing on August 2 to afford the City and councilmembers an opportunity to show cause why they should not be adjudicated in civil contempt. As for the City, the District Court "rejected [its] contention that a dichotomy can be drawn between the City and the council through which it acts." Further, the District Court declined to adopt the Affordable Housing Ordinance for the City, as requested by the City, noting that the City should directly meet its responsibilities under the Constitution and the consent decree. As for the four councilmembers who had voted against the resolution of intent to adopt the Affordable Housing Ordinance, the District Court rejected their request for a continuance, observing that they had been on notice since July 26 of the prospect of contempt and the need for counsel, and that they had rejected the court's offer of an immediate evidentiary hearing. The District Court agreed nonetheless that it would permit argument at a later date on any theory or cir-

cumstance not then available to counsel. The District Court held the City and the councilmembers in contempt and imposed the sanctions set forth in the July 26 order.

On August 9, the Court of Appeals stayed the District Court's contempt sanctions against the City and the four councilmembers pending appeal. On August 26, the Court of Appeals, in a unanimous opinion by Judge Newman, affirmed the District Court's contempt orders and the imposition of coercive monetary sanctions, with one modification in the City's sanctions. First addressing the claims of the councilmembers, the Court of Appeals found that the procedural due process requirements attendant to the contempt adjudications were, with one exception, fully observed. The July 26 order provided sufficient notice to councilmembers of the consequences of noncompliance. Each member appeared with counsel and had an opportunity to present evidence and legal argument. Although the Court of Appeals found that it would have been preferable to have accorded counsel a few days to prepare, it declined to remand the matter given the absence of factual disputes and its decision on the merits. The Court of Appeals also rejected the councilmembers' First Amendment argument, stating that the public interest in obtaining compliance with federal court judgments that remedy constitutional violations justifies whatever burden there may have been on the councilmembers' free expression rights.

As for the argument that the councilmembers were entitled to some form of legislative immunity, the Court of Appeals noted that, even if such immunity extends to individuals performing legislative functions at the purely local level, it would not bar District Court court orders requiring compliance with decrees redressing constitutional violations. The Court of Appeals stressed, however, that it was not necessary to answer the broad question whether a District Court could order local legislators to vote in favor of a particular ordinance to redress a constitutional violation, because the

Council had approved, and the City had signed, a consent decree requiring the enactment of legislation necessary to implement the District Court's earlier order. The Court of Appeals found that all councilmembers, including those who had voted against the consent decree, were obligated to enforce it, and that their failure to do so made appropriate contempt adjudications and the imposition of sanctions.

Along these same lines, the Court of Appeals also decided that the District Court did not abuse its discretion in directing the Council to adopt the Affordable Housing Ordinance, and in imposing coercive contempt sanctions to compel compliance, given that the City had agreed in the consent decree to adopt necessary implementing legislation. As for the claim that the July 26 order compelled the Council to violate state notice and hearing requirements, the Court of Appeals stressed the supremacy of federal court orders in implementing remedies for constitutional violations. The Court of Appeals added that, in any event, the Council could have satisfied the July 26 order by passing a resolution committing itself to enact the legislation in accordance with state law procedures. As for the City's claims, the Court of Appeals rejected the defense of impossibility, noting that the City had not done everything it could under city law to obtain compliance with the orders of the District Court. In particular, the City had not tried to coerce council members into compliance by applying to the Emergency Financial Control Board to take action with respect to the City's financial affairs, or by requesting the Governor of New York to remove the recalcitrant councilmembers for misconduct. In any event, the Court of Appeals concluded, "[f]or purposes of taking official governmental action, the City of Yonkers is the City Council and vice versa." The Court of Appeals noted in this regard that the City has no separate executive authority in that its mayor merely serves on the Council, and that the city manager serves at the pleasure of the Council.

Finally, as to the amount of the coercive fines, the Court of Appeals found that the Excessive Fines Clause of the Eighth Amendment does not apply to civil contempt sanctions imposed to obtain compliance with court orders. Although the court noted that the Due Process Clause of the Fifth Amendment arguably provides a limit, it relied on an abuse of discretion standard to review the amount of the fines. The Court of Appeals held that the District Court acted within its discretion in imposing cumulative fines and in starting the fine schedule at $100 a day, but it modified the schedule so that the fine would be $1 million on day 15 and $1 million for every subsequent day of noncompliance. Given the City's annual budget of $887 million, the Court of Appeals found that a $1 million a day fine was within "reasonable limits."

II

The City argues that the fines imposed by the District Court violate the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fifth Amendment; that the Court of Appeals erred in affirming the contempt adjudication because the District Court did not adopt less restrictive alternatives; that the City had a valid impossibility defense; and that the order violated state law. Councilmembers Spallone and Chema claim legislative immunity. Chema also argues that the contempt sanction violates the First Amendment and his procedural due process rights. Councilmembers Longo and Fagan claim generally that the sanction was an abuse of discretion and unconstitutional.

A. *The City*

The City's first contention is that the Excessive Fines Clause of the Eighth Amendment is applicable to contempt sanctions and that the particular sanctions imposed here were constitutionally excessive. The City accurately observes in this regard that the Court has indicated that the applicability of this Clause to punitive damages in civil cases is "a question of some moment and difficulty." *Bankers Life &*

Casualty Co. v. *Crenshaw*, 108 S. Ct. 1645, 1651 (1988). But, even if the Clause applies to punitive damages, the City offers no compelling reason why we should extend its reach to civil contempt sanctions. Indeed, it appears settled that the Cruel and Unusual Punishment Clause does not apply to civil contempt sanctions. *See Ingraham* v. *Wright*, 430 U. S. 651, 668 (1977). This is not surprising since the Cruel and Unusual Punishment Clause, like the Excessive Fines Clause, applies to punishments for past conduct, while civil contempt sanctions are designed to secure future compliance with judicial decrees. *See ibid.*; *Upham* v. *Wyman*, 360 U. S. 72, 81 (1959). In any event, even assuming that the size of monetary contempt sanctions is limited by the Excessive Fines Clause or even the Due Process Clause, I do not think that the fines against the City, as modified by the Court of Appeals, are unreasonable. The City of Yonkers has an annual budget of $337 million. At one point, it offered to forfeit $30 million in federal funds to avoid compliance with the consent decree. Under these circumstances, a fine schedule which imposes $1 million a day only after noncompliance for fifteen consecutive days can hardly be deemed unreasonable.

The City's second contention is that the contempt adjudication itself was improper because the District Court should have adopted less restrictive alternatives such as direct enactment of the legislation or appointment of an Affordable Housing Commission, and because the City had a valid impossibility defense. Neither contention has merit. First, the District Court had no need to resort to its equitable authority, codified in Fed. R. Civ. P. 70, to deem the legislation enacted, as the City had committed itself to adopting that legislation in a court-approved consent order. Surely it is both less disruptive and more effective to order compliance with that order than to usurp completely the Council's legislative authority and enact the legislation directly. Second, having previously objected to the creation of an Affordable Housing Commission, the City cannot now claim that the Dis-

trict Court should have created such an entity. The City also contends the District Court erred by rejecting its impossibility defense. It claims that it does not have the ability to compel the councilmembers to enact the legislation or to remove recalcitrant members. The City's attempt to divorce itself from the actions of its councilmembers is disingenuous. As the City repeatedly points out in its application, "Yonkers is relatively unique in that most of the governmental power in the City is centralized in the legislative branch." For this reason, the City is the Council. Indeed, because the Council sets municipal policy, *see Pembaur v. City of Cincinnati*, 475 U. S. 469, 481 (1986), it is reasonable to attribute to the City the acts of its elected policymakers.

B. *The Councilmembers*

The councilmembers' primary argument is that a federal court lacks authority to order an individual local legislator, as opposed to the body in which he serves, to enact specific legislation. In the councilmembers' view, a federal court, by entering such an order, runs roughshod over what they see as the local legislator's right to be absolutely free from such restraints. While this issue arguably is of substantial interest, this case is not a proper vehicle for addressing it. In the first place, the broad question raised by the councilmembers is not presented by these facts. As the Court of Appeals stressed below, this is not a case where a federal court enjoined local legislators to vote in favor of a particular bill in order to remedy a constitutional violation. Far from that, this case presents the much more narrow question whether a federal court may order local officials to abide by an explicit obligation—here, a promise to enact legislation—contained in a consent decree that the officials voted to adopt and that the District Court agreed to accept. In short, this case is about a District Court's ability to enforce its consent decrees. In no way did the Court of Appeals even hint that federal courts possess the broad powers over local legislators that the

councilmembers claim that the Court of Appeals arrogated to itself and the District Court.

In any event, it is not at all clear that federal courts lack authority in all circumstances to enter orders affecting a local legislator's performance of his legislative duties. In *Milliken* v. *Bradley*, 433 U. S. 267 (1977), the Court held that a District Court could order local school authorities to implement certain programs designed to ameliorate the effects of prior segregation policies. As a practical matter, the import of the Court's decision was that the individual members of the local school authority were required to vote a certain way for specific remedial programs. This necessary effect of a remedial order is highlighted by the Court's earlier decision in *Griffin* v. *County School Board*, 377 U. S. 218 (1964). There, the Court noted that a District Court possessed authority to order county supervisors "to exercise the power that is theirs to levy taxes" in order to reopen public schools that had been closed in an attempt to avoid a prior desegregation order. As in this case, the individual local officials in *Griffin* openly flouted clear commands of a District Court.

Although cases like *Milliken* and *Griffin* may stand for the proposition that the District Courts may enjoin local legislators to take certain affirmative steps in order to remedy constitutional violations, the Court has never squarely addressed the question whether these local legislators are entitled to some form of legislative immunity. In *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391, 404 n. 26 (1979), the Court specifically left open the question whether local legislators are entitled to any immunity. (Earlier, in *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951), state legislators were afforded absolute immunity for activities within "the sphere of legitimate legislative activity"; *Lake Country* extended such immunity to "regional legislators.") Since *Lake Country* issued, seven Courts of Appeals have held that local legislators are entitled to abso-

lute legislative immunity. None of these cases, however, involved situations where the District Court sought to compel certain behavior to redress constitutional violations, let alone situations where the District Court merely sought to enforce a consent decree. Instead, the cases typically involved private-party damage actions against individual members of local governing boards. It would seem sensible to allow the lower courts to be the first to resolve the question whether legislative immunity protects local officials against the imposition of contempt sanctions for noncompliance with a consent decree imposing legislative obligations.

Even assuming that this question warrants the Court's immediate attention, the instant case contains a factual peculiarity that makes it unsuitable for review. The City stresses its "extraordinary" system of governance, in which the Council exercises both legislative *and* executive powers. This necessarily complicates any legislative immunity analysis, particularly if one believes that the Council exercised its *executive* prerogatives by not complying with the consent decree, and by not abiding by the July 26, 1988, order. Before the Court takes up the issue of local legislative immunity, it should wait for a case in which the legislative body is exercising *only* legislative powers.

Finally, the First Amendment and procedural due process claims strike me as totally meritless for the reasons articulated in the Court of Appeals' opinion. In any event, they involve the application of settled law to a particular set of facts.

III

In my view, the claims presented by the City and the four councilmembers do not merit review by the Court. I therefore vote to deny the applications for stay.

EXHIBIT 1—Order of Hon. Leonard B. Sand, U.S.D.J., Dated May 28, 1986.

UNITED STATES v. YONKERS BD. OF EDUC.

Cite as 635 F.Supp. 1577 (S.D.N.Y. 1986)

UNITED STATES of America, Plaintiff,

and

Yonkers Branch-National Association for the Advancement of Colored People, et al., Plaintiffs-Intervenors,

v.

YONKERS BOARD OF EDUCATION; City of Yonkers; and Yonkers Community Development Agency, Defendants.

CITY OF YONKERS and Yonkers Community Development Agency, Third-Party Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, and Secretary of Housing and Urban Development, Third-Party Defendants.

No. 80 CIV 6761 (LBS).

United States District Court, S.D. New York.

May 28, 1986.

U.S. Dept. of Justice, Washington, D.C., Joshua P. Bogin, Kenneth Barnes, Michael L. Barrett, Sarah Vanderwicken, for plaintiff U.S. Civil Rights Div.

Michael H. Sussman, Yonkers, N.Y., for plaintiffs-intervenors N.A.A.C.P.

Vedder, Price, Kaufman, Kammholz & Day, New York City, Michael W. Sculnick, Gerald S. Hartman, for defendants City of Yonkers and Yonkers Community Development Agency.

Butzel, Long, Gust, Klein & Van Zile, Detroit, Mich., John B. Weaver, John H. Dudley, Mark T. Nelson, Hall, Dickler, Lawler, Kent & Howley, New York City, Paul Whitby, for defendant Yonkers Bd. of Educ.

U.S. Dept. of Justice, Civil Div., Raymond M. Larizza, Calvin E. Davis, Kirk Victor, John W. Herold, Office of Litigation, U.S. Dept. of Housing & Urban Renewal, Washington, D.C., for third-party defendant Dept. of Housing & Urban Development.

HOUSING REMEDY ORDER

SAND, District Judge.

Pursuant to this Court's liability findings of November 20, 1985, the evidence adduced at the remedial hearing, the supplemental findings set forth in the Opinion filed this date and the subsequent written submissions and oral arguments of the parties, the Court enters the following Order.

I. *Injunction*

The City of Yonkers, its officers, agents, employees, successors and all persons in active concert or participation with any of them, are permanently enjoined from:

A. blocking or limiting the availability of public or subsidized housing in east or northwest Yonkers on the basis of race or national origin;

B. confining public or subsidized housing to southwest Yonkers on the basis of race or national origin;

C. otherwise intentionally promoting racial residential segregation in Yonkers;

D. interfering with any person who is exercising or attempting to exercise his or her rights to equal housing opportunities;

E. taking any action intended to deny or make unavailable housing to any person on account of race or national origin, or

F. impeding or interfering with the successful implementation of the school desegregation remedy.

II. *Fair Housing Resolution and Office*

It is further ordered that the City shall take the actions described below to implement a fair housing program.

A. Within 30 days of the date of this Order, the City shall adopt a Resolution of the City Council setting forth the fair hous-

ing policy of the City of Yonkers: to assure equal housing opportunities and nondiscrimination in the provision of housing throughout the entire City.

B. Within 60 days of the date of this Order, the City shall adopt a Resolution of the City Council establishing a Fair Housing Office (FHO). The FHO shall have the general responsibility to administer and implement the fair housing policy of the City and shall have the specific responsibilities described below. The City shall provide for adequate funding of the FHO throughout the life of this Order to ensure that it may fully carry out its responsibilities. The FHO shall establish a principal office and auxiliary offices as needed. The FHO shall publicize and promote the services it offers.

C. The FHO shall be headed by an Executive Director. The City shall provide funds for sufficient staff to carry out all of the FHO's responsibilities under this Order. Staff shall be hired by the Executive Director.

D. Within 30 days after passage of the FHO Resolution, the City shall submit to the United States and plaintiffs-intervenors the names and qualifications of not less than three candidates for Executive Director. Within 15 days thereafter, the United States and plaintiffs-intervenors shall respond to the City, indicating which, if any, of the candidates are acceptable.

The City Manager shall, within 15 days of these responses, appoint a candidate from among those approved by both the United States and plaintiffs-intervenors. If the United States and plaintiffs-intervenors do not agree on the acceptability of any of the City's candidates, they shall include in their responses to the City the names of two or more candidates of whom they approve. If the City Manager finds none of these alternative candidates acceptable, this Court shall make the selection from among all those suggested by the parties. If the position of Executive Director becomes vacant during the life of the decree, the same procedure shall be followed in making subsequent appointments with time periods adjusted so that the position does not stay vacant for longer than 60 days.

E. In order for the other parties effectively to monitor the City's compliance with its obligations under this Order, the FHO shall submit to the City Manager and the United States and plaintiffs-intervenors each year during the life of this Order a proposed plan of activities and programs for the following year. The first such plan shall be submitted within 60 days of the appointment of an Executive Director. The United States and plaintiffs-intervenors shall have 30 days to make suggestions and comment on the plan before it is adopted by the City Manager. The City Manager must adopt a plan within 60 days of its submission.

The FHO shall also, on a semi-annual basis, report to the United States and the plaintiffs-intervenors on its activities for the period, including any difficulties encountered in carrying out its responsibilities under this Order. The FHO shall maintain detailed records of its activities and, upon reasonable notice, shall make these records available to the United States or plaintiffs-intervenors for review.

F. The FHO shall have the functions and responsibilities as set forth below:

"1. On an ongoing basis, the FHO shall review the activities of City agencies and offices for compliance with the fair housing policy of the City and the terms of this Order. The FHO shall, as it deems appropriate, make recommendations to such entities for actions to be taken to ensure compliance with the fair housing policy and this Order. In its reports to the United States and plaintiffs-intervenors, the FHO shall include full information about its reviews of City agencies' activities, any recommendations made by the FHO and any agency action taken in response to such recommendations.

"2. The FHO shall conduct educational programs for City and School District personnel, as well as for the community at large, to explain the City's fair housing policy and its enforcement efforts and obligations under this Order. Such programs

should be designed to elicit support for the remedial efforts of the City and the Board of Education and to promote racial harmony in Yonkers. The FHO shall coordinate with the School Board the development and presentation of programs explaining fair housing policy to City school children. These educational programs shall be initiated as soon as possible (and, in no event, more than 60 days) after the appointment of an Executive Director. To the extent appropriate and feasible, the FHO shall make use of the services and experience of private and public organizations which have developed programs to aid communities experiencing desegregation.

"3. The FHO shall collect information relating to housing needs and services, identify available rental and sales units within the City and provide information to homeseekers seeking housing on a nondiscriminatory basis and inform them of the availability of rental management companies, brokers, local lending institutions and agents. To assist the FHO in the gathering of this and any other relative information, the FHO shall have the right and authority to issue subpoenas which shall be enforceable by this Court. The FHO shall perform all of its functions on a continuing and nondiscriminatory basis throughout the life of this Order. The FHO shall ensure that all persons who request its assistance in obtaining housing are made

aware of housing opportunities in all areas of the City. The FHO shall in particular make such information available to all persons in the City receiving Section 8 certificates who seek its services and the Municipal Housing Authority (MHA) shall inform persons obtaining certificates from that agency of the services available through the FHO.

"4. The FHO shall offer training concerning fair housing practices for persons in the housing rental and sales business. In addition, the FHO shall require and conduct training concerning fair housing practices for all persons responsible for the management or marketing of housing currently receiving City assistance or housing developed pursuant to the Order.

"5. The FHO shall ensure that all housing made available pursuant to the operation of this Order, and all housing otherwise receiving City, state or federal assistance, including housing in the southwest quadrant, be affirmatively marketed either through the FHO's own efforts or by review, approval and monitoring of the affirmative marketing plans of persons providing such housing. These efforts shall be designed to ensure that such housing is made available to all persons regardless of race or national origin and to ensure that persons who, based on past experience, have been least likely to occupy housing in a particular area of the City are fully informed of all housing opportunities there.

The affirmative marketing plans shall be consistent with the occupancy priorities provisions (¶ VII) of this Order.

"6. The FHO shall coordinate with appropriate personnel from the Yonkers Board of Education to ensure that demographic data, school enrollment data, plans for housing and school program development and other information relevant to the remedial process is available to both the Board and the City.

"7. In providing information about available housing resources to persons seeking such information, the FHO also shall inform such persons of their rights to equal housing opportunities under the City's fair housing policy, state law and the Federal Fair Housing Act of 1968. The FHO shall alert persons seeking housing that a refusal to rent or sell on account of race or national origin or the imposition of different terms and conditions of rental or sale on account of race or national origin, is against the law, and shall encourage such persons to immediately report any suspected discrimination to the FHO. The FHO shall refer persons who wish to file complaints concerning suspected discrimination to, as appropriate, the Yonkers Commission on Human Rights, HUD, the New York Division of Human Rights, and the United States Department of Justice, and shall inform them of other assistance available through private non-profit agencies. The

FHO shall assist complainants in communicating with the appropriate agencies and shall cooperate with such private and governmental agencies in their activities. The FHO shall not conduct or intervene in litigation proceedings except proceedings to enforce subpoenas issued pursuant to paragraph 3 hereof."

III. *Transfer of Section 8 Administration*

It is further ordered that the City shall, within 60 days of the date of this Order, seek HUD approval to transfer administration of its Section 8 existing program to the Yonkers Municipal Housing Authority (MHA). The FHO shall cooperate with the MHA in assisting certificate holders to obtain housing in all areas of the City on a nondiscriminatory basis and shall report on its own and the MHA's actions in this regard. HUD shall advise the Court and the parties within 30 days after such application whether it has approved the transfer, and if not, its reasons for such disapproval.

IV. *Public Housing Units*

The City has previously committed itself to provide acceptable sites for 200 units of public housing as a condition for receiving its 1983 Community Development Block Grant ("CDBG") funds but has failed to do so. Pursuant to the 1984 HUD-NAACP Consent Order entered by this Court, HUD agreed to fund 200 units of public housing east of the Saw Mill River Parkway. The

Consent Order provided that HUD would initiate procedures to reduce funding of the City's 1984–85 CDBG entitlement grant up to its full amount unless the City submitted to HUD for preapproval sites for at least 140 of the 200 units. But for the terms of this Order, HUD's authority to commit the 1984–85 CDBG funds would expire on September 30, 1986 (funds for the grant were appropriated in 1983 and "remain available until September 30, 1986." P.L. 98–45, 97 Stat. 223, July 12, 1983). HUD shall obligate the funds prior to the expiration of the funding authority in September if either (a) the City submits an acceptable Housing Assistance Plan (HAP) and other documentation as required by 24 C.F.R. § 570.302 prior to that expiration, or (b) such HAP and documentation are deemed submitted as herein provided. If the City submits all requisite documents, HUD shall obligate the funds, but make their availability conditional on the City submitting acceptable sites in East Yonkers for development of 140 units of public housing. (The Court finds such action would be consistent with HUD's obligations under paragraph 6.B. of the March 19, 1984 Consent Decree with the NAACP). The City would accept this condition by execution of a grant agreement containing the condition. Because, but for the terms of this Order HUD could not obligate the funds until the City submits all necessary documents, the City is hereby ordered to submit the required

documents and execute the conditional grant agreement prior to the expiration of the funding authority, and to make timely submission of acceptable sites.

A. Accordingly, it is ordered that the City shall, within fifteen (15) days of the date of this Order, submit to HUD an acceptable HAP for the 1984–85 program year and other documentation required by 24 C.F.R. § 570.302. HUD shall advise within ten (10) days thereafter if the HAP and other documentation is acceptable. If the City fails to submit an acceptable HAP and other documentation as heretofore provided, plaintiff and plaintiffs-intervenors shall submit same to the Court and to HUD within the next five (5) days, and upon approval by this Court, said submission shall be deemed to be the HAP for the City of Yonkers for the 1984–85 program year and to have satisfied any and all HUD regulations and relevant statutes requiring such HAP.

B. It is further ordered that the City shall, within fifteen (15) days of the date of this Order, execute a grant agreement with HUD for the 1984–85 program year, with the condition that receipt of the grant depends on submission of acceptable sites for 140 units of family public housing. If the City fails to execute such grant agreement within fifteen (15) days from the date of this Order, plaintiff and plaintiffs-inter-

venors shall submit such an agreement to the Court and to HUD within the next ten (10) days, which grant agreement, upon approval by the Court, will be deemed to have been executed by Yonkers and to have satisfied any and all relevant statutes and HUD regulations requiring such agreement.

C. It is further ordered that the City shall within thirty (30) days of the date of this Order, submit to HUD for preapproval at least two sites for 140 units of family public housing, along with the necessary supporting documentation. HUD shall ad- the owner under which the owner (or developer with an option that provides control) of the site agrees, if selected pursuant to the MHA's request for Turnkey proposals, to develop on a Turnkey basis a specified number of public housing units. The public housing units may themselves constitute the total development of the site or be a part of a larger (public/private) development on the site. The owner (or developer with an option that provides control) of the site must also agree to make the site available to the developer whose Turnkey proposal is selected should the proposal by the owner (or developer with an option that provides control) not be selected as a result of the MHA's request for Turnkey proposals.

E. It is further ordered that within ninety (90) days of site preapproval for the 140 units, the City shall cause the MHA to submit site development proposals, pursuant to 24 C.F.R. § 941.404, for the preapproved sites. If the City shall fail to submit site development proposals within the said time period, the plaintiff and plaintiffs-intervenors shall submit same to the Court and to HUD, which, upon approval by the Court, shall satisfy any and all statutory or regulatory requirements in the manner heretofore provided.

F. If Yonkers shall not comply with the directions contained in this Order so that the obligations which are its primary responsibility to designate sites and provide the necessary documentation for the development of the housing units referred to herein devolve on the plaintiffs and plaintiffs-intervenors, the Court may appoint a person expert in such matters to assist the Court and the parties in the preparation of the materials required pursuant to this Order, whose reasonable compensation shall be paid by Yonkers.

V. *Affordable Housing Trust Fund*

The City shall create an Affordable Housing Trust Fund to be administered by the Fair Housing Office in cooperation with HUD and the MHA. The City will initially fund the trust with not less than 25 percent of the CDBG funds presently allocated by

vise within fifteen (15) days thereafter whether the sites so submitted are approved. If the City fails to designate approved sites within the time periods set forth herein, and only if the City fails to make such designation, then the City will be deemed to have submitted as said sites such combination of the following sites *and* any other available sites as plaintiff and plaintiffs-intervenors shall designate and the Court shall approve:

(a) School 4. This site may be used for rehabilitation of the existing school building and new construction on that site, or new construction on the black top area, or some combination thereof;

(b) School 15 and the Walt Whitman School. If this provision becomes operative by virtue of the failure of the City to designate alternative sites, the School Board is hereby ordered to return the Whitman site to the City. The School Board may, if it wishes, reserve to itself rights to occupy such space on the Whitman site as shall be reasonably necessary and appropriate for teacher training and library storage facilities (the only uses for Whitman presently envisioned by the School Board).

Nonassisted units may also be placed on the aforesaid sites together with assisted units (*e.g.*, in an 80/20 ratio) provided that the total number of assisted units resulting from all site designations is 140 units.

D. It is further ordered that, within ninety (90) days of the date of this Order, the City shall submit sites to HUD, with all the necessary supporting documentation for the remaining 60 units of public housing committed by HUD pursuant to the 1984 Consent Order, which sites shall (unless otherwise authorized by the Court) be selected from a list contained in Exh-NAACP RH-16 (6 available privately-owned sites listed by the Yonkers Planning Director as suitable for development of public housing). Provided, however, that no privately owned sites from this list shall be submitted unless such submission is accompanied by either (a) an agreement of sale or assignable option between the MHA and the owner of the property or (b) a written agreement between the MHA and HUD to the City which minimum funding level may be diminished by 5 percent in each of the three succeeding years. In addition, the City will use its best efforts to secure additional funding for the trust fund from other governmental and private sources.

1. These funds will be used to foster the private development of low and moderate income housing by developers who will include 10 percent to 20 percent low and moderate income housing in their proposed development by providing the following incentives:

(i) write down of the site price of City-owned land;

(ii) finance surveys, market analyses and other similar pre-construction costs;

(iii) finance site infrastructure improvements such as sewers;

(iv) interim construction loan financing at below market interest rates;

(v) rental and/or mortgage subsidies to low and moderate income households in such developments; and

(vi) funds to low and moderate income families for rehabilitation.

2. Housing developments will be chosen by the Fair Housing Office to receive trust fund aid in order to advance racial and economic integration.

VI. *Plan for Development of Additional Subsidized Housing*

The City shall develop a Plan for the creation of additional subsidized family housing units (beyond the 200 units provided for in IV, *supra*) in existing residential areas in east or northwest Yonkers. In such Plan, the City shall be free to provide for the utilization of such private and public funding resources as are available to it including the Affordable Housing Trust Fund. The Plan may provide for units of subsidized housing to be part of a larger development including market rate housing

in such ratio (*e.g.*, 80 percent market rate; 20 percent subsidized) as shall be appropriate for the site and proposed development. The City may also provide such units by requiring private developers to construct units of subsidized housing as a condition to obtaining variances or zoning changes, which subsidized units may be on the site in question or on another acceptable site or sites. The City may also provide in its Plan for the purchase and/or lease by MHA of available units in existing private condominiums, co-operatives or rental buildings throughout Yonkers. However, before such units may be included in the Plan, the City must have obtained realistic assurances that the units will in fact be available for this purpose (*e.g.*, the willingness of the seller; approval of cooperative board, if required; acceptable price, etc.). The City shall furnish to the Court and the parties a detailed statement of this Plan by November 15, 1986, which Plan shall contain the following:

(a) number of subsidized units proposed for construction or acquisition;

(b) location of such sites;

(c) rent levels or degree of subsidization;

(d) marketing or rent-up plans;

(e) such other information as shall be necessary or appropriate to enable evaluation of the feasibility of the Plan and the extent to which the construction or acquisi-

tion of the units in question will further the integrative goals of this Order.

The parties shall have thirty (30) days thereafter to comment on said Plan, after which time the Court may schedule a hearing to determine its adequacy in light of the violations and needs found to exist. In the event that the Plan shall be found to be inadequate, the Court reserves all of its rights and powers to make such modifications in the Plan or require such additional action by the City as the circumstances shall warrant.

VII. *Occupancy Priorities*

A. Public Housing

The first priority for occupancy of public housing units made available in east Yonkers shall be given to eligible persons on the existing waiting list for such housing. The second priority for these units shall be given to families now living in southwest Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of this Court's School Desegregation Order of May 14, 1986.

B. All Other Units

The first priority for occupancy of all other units made available pursuant to this Order in east Yonkers shall be given to families now living in southwest Yonkers who have school age children whose attendance at Yonkers public schools will further

the integrative objectives of the School Desegregation Order of May 14, 1986.

C. It is anticipated that the City will continue and accelerate its efforts to rehabilitate substandard housing throughout the City, although rehabilitation efforts in southwest Yonkers will not relieve the City from its other obligations hereunder. The first priority for occupancy of rehabilitated units in southwest Yonkers shall be given to eligible families living in east Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of the School Desegregation Order of May 14, 1986.

The first priority for occupancy of rehabilitated units in east Yonkers shall be given to eligible families living in southwest Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of the School Desegregation Order of May 14, 1986.

VIII. *City to Seek Available Financing*

The City shall submit timely and complete applications for CDBG entitlement funds for each program year during the pendency of this Order, including appropriately prepared Housing Assistance Plans, and assurances of compliance with all conditions placed on receipt of such funds. The City shall seek all other available forms of financial assistance from both public and private sources which are cur-

rently available or which become available during the pendency of this Order.

IX. *Notice*

The City shall not grant any zoning change or variance or issue a building permit to any private developer with respect to any of the sites referred to in this Order or listed on Exh-NAACP R.H. 16 without furnishing twenty (20) days prior written notice to the United States, the plaintiffs-intervenors and the Court.

X. *Funding*

The City shall provide funding for all of the measures set forth herein. The City shall also provide funding for all of the school desegregation measures required by this Court's Order of May 14, 1986.

The City and its agencies responsible for implementing the remedial Order shall maintain records of all actions taken pursuant to the Order. All such records shall be made available for review by the United States and plaintiffs-intervenors upon reasonable notice.

XI. *Jurisdiction*

This Court shall retain jurisdiction of this matter for five years. At the end of that period, the City may move for the dismissal of this case. Dismissal shall be granted unless, within thirty days from receipt of that motion, the United States or plaintiffs-intervenors object to the dismissal. If such an objection is made with sufficient particu-

larity, the Court shall hold a hearing on the dismissal motion, and the objecting party shall have the burden to demonstrate why the motion should not be granted. If the objecting party fails to carry its burden, the case shall be dismissed with prejudice.

SO ORDERED.

EXHIBIT J—Opinion of Hon. Leonard B. Sand, U.S.D.J., Dated July 10, 1987.

U.S. v. YONKERS BD. OF EDUC.
Cite as 662 F.Supp. 1575 (S.D.N.Y. 1987)

UNITED STATES of America, Plaintiff,

and

Yonkers Branch-National Association for the Advancement of Colored People, et al., Plaintiffs-Intervenors,

v.

YONKERS BOARD OF EDUCATION; City of Yonkers; and Yonkers Community Development Agency, Defendants.

CITY OF YONKERS and Yonkers Community Development Agency, Third-Party Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, and Secretary of Housing and Urban Development, Third-Party Defendants.

No. 80 CIV 6761 (LBS).

United States District Court,
S.D. New York.

July 10, 1987.

U.S. Dept. of Justice, Civil Rights Div., Washington, D.C., Sarah Vanderwicken, for plaintiff U.S.

Michael H. Sussman, Yonkers, N.Y., for plaintiffs-intervenors N.A.A.C.P.

Vedder, Price, Kaufman, Kammholz & Day, Michael W. Sculnick, New York City, for defendants City of Yonkers and Yonkers Community Development Agency.

Butzel, Long, Gust, Klein & Van Zile, John B. Weaver, John H. Dudley, Mark T. Nelson, Detroit, Mich., for defendant Yonkers Bd. of Educ.

U.S. Dept. of Justice, Civ. Div., Raymond Larizza, Calvin E. Davis, Washington, D.C., John W. Herold, Office of Litigation, U.S. Dept. of Housing & Urban Renewal, Washington, D.C., for third-party defendant Dept. of Housing & Urban Development.

OPINION

SAND, District Judge.

By letter dated July 8, 1987, counsel for the City of Yonkers forwarded to the Court copies of three resolutions adopted by the City Council on July 7, 1987:

1) Resolution No. 139–1987 with respect to the adoption of a Housing Assistance Plan (Appendix A);

2) Resolution No. 140–1987 with respect to a request to the County of Westchester (Appendix B);

3) Resolution No. 141–1987 with respect to an "alternate plan" (Appendix C).

Resolutions Nos. 139 and 140 are said by the City to be in compliance with this Court's Order of July 1, 1987 (Appendix D). At a telephone conference among all the parties held at the City's request on July 9, 1987, counsel for the Department of Justice advised that the Department was not yet in a position to state whether or not Resolution No. 139 was adequate. The Court directed that counsel for the Department and HUD expeditiously review the matter and promptly advise the Court if there were any perceived inadequacies in that resolution.

Counsel for the City, at said conference, assured the Court and the parties that Resolution No. 140 (the request to the County) was a separate, completely independent resolution and was not subject to any conditions or qualifications set forth in Resolution No. 141. Nor was Resolution 140 superseded by Resolution No. 141. (See Transcript, July 9, 1987). Counsel for the City further assured the Court and the parties that the City intended to furnish to the County, together with its request, the amplifying data set forth in this Court's July 1st Order and that the City would furnish the Court and the parties with copies of such submission prior to transmission to the County. Here too, the parties are to advise the Court as soon as possible if they believe that there are any

inadequacies in this resolution's compliance with the July 1st Order.

Resolution No. 141 proposes an alternative plan and seeks to impose conditions upon the Court before the City would seek to obtain the necessary consents and waivers. The conditions include a 90-day stay; a limit of 100 on the amount of construction in addition to the first 200 units; a prohibition against mixing affordable and public housing. The resolution which proposes eight sites also contains a proviso that if any portion of the resolution is not complied with, the entire resolution is to be deemed null and void. The resolution recites that it is enacted pursuant to a request by a number of east side civic groups listed in the resolution.

As the Court advised the parties at its July 9th conference, the constructive participation by the Yonkers City Council and these and other civic groups in the formulation of a housing remedy is welcomed and is to be encouraged. Before the Court would enter any final order directing the construction of any housing, it would give due consideration to any proposals made on behalf of Yonkers including proposals involving alternate or additional sites and densities. However, before any such alternatives could be seriously considered, the Court would have to be assured that the

proposals were viable and met all relevant criteria. In this regard, the Court directed HUD to conduct a preliminary evaluation of the Andrus Field site, the only site listed in the resolution not previously inspected by HUD.

The Court urges Yonkers to proceed as expeditiously as possible to obtain the consents and waivers needed to demonstrate the feasibility of its alternative plan. If and when Yonkers comes before the Court and makes a showing that it has either obtained formal approvals for the sites or a persuasive showing that the requisite approvals have informally been given, the Court will give careful and sympathetic consideration to any such alternative plan. In the interim, the parties are, of course, to proceed pursuant to the timetable set forth in the July 1st Order.

Insofar as any request for a stay is concerned, if it should develop that construction is about to commence prior to any ruling by the Court of Appeals in the appeal now pending before that Court and any party shall move for a stay of such construction, the Court will also give such an application careful and sympathetic consideration in the light of the conditions then obtaining. It is not the intent of the Court to require that any wasteful or counterproductive action be taken. The Court further assures the parties that it will permit a

sufficient interval of time between any ruling of this Court with respect to a stay and the commencement of construction to enable any party dissatisfied with any aspect of this Court's ruling on such an application to seek appellate review of this Court's determination.

As was acknowledged at the July 9th conference, any determination as to the total number of units eventually to be constructed pursuant to the housing remedy order prior to the receipt of the Outside Housing Advisor's reports and the comments of all the parties would be premature. No such determination of the total number of units to be built or of any mix of public and affordable housing will be made, however, without a full hearing, at which the views of Yonkers will be carefully considered.

SO ORDERED.

APPENDIX A

BY VICE MAYOR OXMAN:

WHEREAS, pursuant to the Order of the Hon. Leonard Sand, United States District Judge, entered May 28, 1986 in the matter entitled "U.S.A. v. City of Yonkers etc." in part VIII thereof the City of Yonkers was required to prepare and approve appropriate Housing Assistance Plans in a timely manner; and

WHEREAS, pursuant to said Court Order the plaintiffs have previously submitted a Three Year Housing Assistance Plan dated June 19, 1986 with a period of applicability from October 1, 1985 to September 30, 1986; and

WHEREAS, on advice of Appellate Counsel and without prejudice to our rights on appeal,

BE IT RESOLVED that the City of Yonkers, in City Council convened, hereby adopts the attached Housing Assistance Plan for the fiscal year 1987 with a period of applicability from October 1, 1986 to September 30, 1987 for Grant No. B-85-MC-36-0112 as the Second Year of the Three Year HAP approved July 11, 1986 and the City Manager is directed to forward same to the U.S. Department of Housing and Urban Development, Community Development Block Grant Program, Entitlement Program.

Adopted by the City Council at a stated meeting held on July 7, 1987, by a vote of 9 to 4, Minority Leader Longo, Councilmembers Palais, Spallone and Fagan voting "NAY."

COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM
ENTITLEMENT PROGRAM

HOUSING ASSISTANCE PLAN For FY '87

City of York, [illegible]

B - 85 - MC - 16 - 0112

7/1/87 to 9/30/87 | ☒ Original ☐ Revision ☐ Amendment | SUBMISSION ☐1 ☒2 ☐3 | HUD APPROVAL

Signature of Authorized Official — Date

INCORPORATION OF HAP, PARTS I-III, BY REFERENCE Part I, Item III of the HAP approved 7/11/86
(or most recently approved and are not contained in this (second) third year submission (Insert amendment date of the HAP, Part I - III, if any)

PART IV - ANNUAL HOUSING ASSISTANCE GOALS

PROGRAM OR PROJECT (List HUD Assisted Rental Housing Programs first, then Owner Programs and Owner Programs Separately) A	HUD B	UNITS TO BE ASSISTED: NUMBER OF UNITS C	UNITS TO BE ASSISTED: HOUSING TYPE D	LOWER INCOME HOUSEHOLDS TO BE ASSISTED: ELDERLY E	SMALL FAMILY F	LARGE FAMILY G	TOTAL H
Rental Rehabilitation Program	x	20	Rehab	2	12	6	20
Section 8 Existing (Renters)	x	25	Existing	8	14	3	25
Section 312 Rehabilitation Program (Renters)	x	15	Rehab	4	8	3	15
CDBG Rehabilitation Loan and Grant Program (Renters)		18	Rehab	5	10	3	18
CDBG Rehabilitation Program (Owner)		12	Rehab	2	5	1	8

APPENDIX B

BY MAYOR MARTINELLI AND VICE MAYOR OXMAN:

WHEREAS, on July 1, 1987 the Hon. Leonard B. Sand, United States District Judge, entered an Order requiring the City Council to adopt certain resolutions under threat of contempt of court which would result in devastating fines to the taxpayers of the City of Yonkers, and

WHEREAS, the adoption of this Resolution is in compliance with the Order of the Court and is without waiver to the City's right to appeal from the Order requiring the adoption of this Resolution;

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Yonkers that the City of Yonkers hereby requests that the County Board of Legislators of Westchester County issue a binding declaration that with respect to those specific sites designated by the Court-appointed outside Housing Advisor, Oscar Newman, pursuant to Paragraph 9 of the Court Order entered July 1, 1987, the County waives any reverter interest in such sites should they be used for the purposes of housing pursuant to Orders of the Hon. Leonard B. Sand in the action entitled *United States of America and Yonkers Branch NAACP v. Yonkers Board of Education City of Yonkers, etc.* Docket No. 80 CIV 6761 and that we request that the

County take prompt action in responding to this request.

BE IT FURTHER RESOLVED that the City Clerk is hereby directed to forward a certified copy of this Resolution forthwith to the Clerk of the Board of Legislators of the County of Westchester.

Adopted by the City Council at a stated meeting held on July 7, 1987, by a vote of 8 to 5, Minority Leader Longo, Councilmembers Palais, McKirgan, Spallone and Fagan voting "NAY."

APPENDIX C

BY MAYOR MARTINELLI, VICE MAYOR OXMAN, COUNCILMEMBERS BURGESS, NUCKEL, MANGIERI, WASCISKO AND RESTIANO;

WHEREAS, the United States District Court, by the Hon. Leonard B. Sand, in Order entered July 1, 1987 has determined that the first 200 units of public housing shall be built on Walt Whitman Junior High school, Lincoln High school, School No. 4 and School No. 30, and

WHEREAS, the Court has required that the City adopt a resolution requesting the County of Westchester to waive its reverter interest in all County surplus property identified by Oscar Newman for the construction of any housing pursuant to this Court Order, and

WHEREAS, the City Council on April 15, 1987 adopted Resolution No. 69–1987 suggesting that the Court adopt an alternate housing plan which would reduce the density of public housing on the school sites and thereby reduce the impact of such housing on the surrounding neighborhoods with several conditions incorporated therein, and

WHEREAS, on or before July 6, 1987 a number of east side civic groups including Crestwood Civic Association, Armour Villa Taxpayers Association, East Yonkers Homeowners and Wildlife Association, Lawrence Park West Neighborhood and Homeowners Association, Mohegan Heights Homeowners Association, Sunnyside Park Community Association, Taxpayers of Northeast Yonkers, Beech Hill Civic Association, and Victory Heights Homeowners Association, adopted a resolution requesting that the City Council renew its attempts to pursue the alternative housing plan provided certain conditions are incorporated within that plan while the City pursues its appeal to the fullest extent, and

WHEREAS, it is imperative that the City Council protect the taxpayers of the City of Yonkers from potentially devastating fines as well as a finding of contempt and at the same time minimize the potentially devastating effect that wide spread housing developn.ent would have on the east side of Yonkers without waiving any of the City's

rights in pursuing its appeal of the Court's Orders in this case.

NOW, THEREFORE, BE IT RESOLVED, that the City Council in accordance with the Resolution adopted by the East Side Civic Associations listed above, request the Court to consider implementing an alternative housing plan pursuant to Resolution No. 69–1987 adopted on April 15, 1987 except as modified below.

BE IT FURTHER RESOLVED, that the City Council reserves all of its rights on its appeal in the matter entitled *United State of America v. City of Yonkers* and reaffirms its commitment to appeal the liability Order and the Housing Remedy Orders and all other Orders to date all the way to the Supreme Court of the United States, if necessary.

BE IT FURTHER RESOLVED, that the City Council requests that the Court modify its Order placing 200 units of public housing on only the four school sites and instead reduce the density of each site and to place no more than the following number of units on the following sites:

Walt Whitman Junior High school—38–41 units

School No. 4—38–41 units

Lincoln High school—38–41 units

School No. 30—8–10 units facing or adjacent to Nevada Place only

Kardash Park—30–36 units

Redmond Field—10–12 units
Andrus Field—16–18 units
Hillview Reservoir—10–12 units
all in a semi detached or town house style.

BE IT FURTHER RESOLVED, that the City Council requests that the Court grant to the City of Yonkers a stay of construction of any public housing units until 90 days following the date of the decision of the City's appeal to the Second Circuit Court of Appeals and that the Court not place any affordable or other housing on any site on which the Court directs public housing to be built and that not more than 200 additional units of affordable or other housing be provided pursuant to the Housing Remedy Order, with not more than 100 to be new construction.

BE IT FURTHER RESOLVED, that in the event the Court grants a stay as set forth above and limits the construction of housing as requested above, the City Council hereby requests the County of Westchester to waive any present or future interest including reverter rights in those residual parcels known as "N" (Redmond Field), and "X" (Kardash Park) for the municipal purpose of Court Ordered public housing and for no other purpose notwithstanding any other resolution adopted by the City Council; that the City Council requests that a small portion of Andrus Park be de-dedicated as parkland, if necessary, but only to the extent of small south-

erly portion of the park up to and including the first two tennis courts for the construction of Court Ordered public housing as set forth in this resolution; and that the City Council hereby requests from the City of New York and/or the City of New York Water Board the transfer of a certain small portion of the Hillview Reservoir property along Shipman Avenue for the construction of public housing as set forth above.

BE IT FURTHER RESOLVED, that the City Council hereby requests the Board of Education to declare as surplus those portions of the school property to be used for public housing pursuant to this resolution and Court Order and return same to the City.

BE IT FURTHER RESOLVED, that the City Council declares that no further housing pursuant to the Court Order would be constructed on school property.

BE IT FURTHER RESOLVED, that the City shall build additional tennis courts and other recreational facilities at School 30 and Walt Whitman to more than replace any loss of such facilities.

BE IT FURTHER RESOLVED, that in the event that any portion of any of this Resolution is not complied with the entire Resolution be deemed null and void and with no effect.

Adopted by the City Council at a stated meeting on July 7, 1987 as amended by a vote of 8 to 5, Minority Leader Longo, Councilmembers Palais, McKirgan, Spallone and Fagan voting "NAY."

APPENDIX D

ORDER

SAND, District Judge.

On May 28, 1986, this Court issued its Housing Remedy Order which required the City of Yonkers to take certain specific actions to cure the intentional racial segregation found in this Court's liability Opinion, 624 F.Supp. 1276 (S.D.N.Y.1985). The City of Yonkers has failed to take many of the actions required by the Housing Remedy Order. Instead, the City has delayed meaningful remedial action and declined repeated opportunities accorded to the City to act itself in the first instance in taking remedial action.

In this light and cognizant of its responsibility to insure implementation of the 1986 Housing Remedy Order, the Court, on the joint application of the United States Department of Justice and the Yonkers Branch-National Association for the Advancement of Colored People, hereby orders:

I. PUBLIC HOUSING

1. By July 3, 1987, the Outside Housing Advisor (hereinafter "OHA") shall submit to the Court and the parties his proposal, including unit distributions, for the 200 units of public housing reserved by HUD through its Consent Decree with the plaintiff-intervenors (as approved by this Court on March 19, 1984). In submitting this proposal, the OHA shall utilize the following sites: Whitman; School 4; Lincoln High School and School 30. The OHA shall also include in his proposal a statement of the unit distributions and other consequences which would result if only the Whitman and School 4 sites were utilized for the 200 units.

2. With respect to the School 30 and Lincoln High School sites, HUD shall forthwith provide funds if necessary to complete site surveys and preliminary analysis deemed necessary for its review.

3. By July 9, 1987, HUD shall report to the Court any and all steps necessary for resolution of the "historic preservation" review regarding School 4 and its timetable for their accomplishment. The Court has previously determined and now reaffirms that the black-top across from School 4 on Trenchard Street is considered part of the School 4 site for purposes of this Order.

4. By July 13, 1987, the parties shall submit to the Court comments concerning the OHA's proposal. If the Yonkers

School Board opposes the utilization of portions of the Lincoln High School and School 30 sites for these purposes and wishes an evidentiary hearing on this issue, it shall so advise the Court and such hearing will be held on July 15, 1987 at 10:00 A.M. and continue until concluded.

5. By July 13, 1987, HUD shall submit to the Court the final and approved RFPs, as proposed by the Municipal Housing Authority, for the Whitman and School 4 sites. By this date, HUD shall advise the Court whether these RFPs or either of them may be used for the Lincoln High School and School 30 sites and, if not, what changes it deems required for such use.

6. By July 27, 1987, HUD shall review the suitability of School 30 and Lincoln High School (such portion as the OHA designates) for the units of public housing proposed by the OHA and shall apprise the Court and the parties of any specific deficiencies these sites may possess for the intended uses. By the same date, HUD shall also inform the Court of any measures it believes should and may be taken to mitigate these deficiencies and thereby improve the sites for their intended uses.

7. By August 7, 1987, the parties shall submit to the Court any further written submissions deemed relevant to the development of the 200 units of public housing on the sites identified by the OHA. There-

after, the Court shall determine whether further proceedings should precede entry of a final Order.

II. LONG TERM HOUSING PLAN

8. The May 28, 1986 Housing Remedy Order required the City of Yonkers to submit a long term housing remedy plan by November 15, 1986. The City failed to do so. After the Department of Justice moved to hold the City in contempt of court for this failure, among other acts of noncompliance with the Remedy Order, and the plaintiff-intervenors moved for the appointment of a Housing Master to take required remedial activities, the Court permitted the City to nominate an Outside Housing Advisor. In light of the events which have transpired subsequent to this nomination, the Court directs that the OHA shall cease functioning as representative or designee of the City and shall act solely in the capacity of an advisor to the Court pursuant to the provisions of paragraph IV-F. of the Housing Remedy Order.

9. By July 7, 1987, to facilitate implementation of the long term housing remedy, the Court hereby directs that the OHA advise the Court and the parties of those sites formerly owned by the County of Westchester which the OHA believes may be suitable for housing to be built pursuant to the long term housing plan.

10. By July 15, 1987 the City of Yonkers shall request from the County of Westchester a binding declaration that, with respect to the sites designated pursuant to paragraph 9 hereof, the County waives any reverter interest in such sites should they be used for the purposes of housing pursuant to Orders of this Court. The City shall request prompt action by the County. In making its request of the County, the City shall provide pertinent information showing (a) the uses, if any, to which the parcels in question have been put since 1961, (b) any current municipal plans (developed before March 1, 1987) for such parcels and (c) the uses to which comparable parcels have been put heretofore. By July 13, 1987, the City shall furnish to the Court and the parties a copy of its proposed request of the County, including the foregoing information.

11. By August 7, 1987, the OHA shall provide the Court and the parties with his proposal for a long term housing remedy plan.

12. This plan shall both identify sites (publicly and privately held) which the OHA deems potentially feasible for the provision of assisted housing, housing, other than new construction or rehabilitation on the identified sites and enumerate those contributions to the development of such housing which the City of Yonkers should be required to make. This plan shall

present alternatives assuming a final goal with respect to assisted units of 200, 400, 600 or 800.

13. By August 22, 1987, the parties shall submit comments concerning the long term housing remedy proposal. The Court shall then determine whether further proceedings are necessary before entry of a final remedial Order.

14. On or before July 9, 1987, the City shall adopt and submit to HUD (with copies to the Court and the parties) a Housing Assistance Plan (HAP) for its Year 13 Community Development Block Grant application (as required for the receipt of grants by the Housing and Community Development Act of 1974, as amended). The HAP shall be in good faith compliance with the relevant statutes and regulations and consistent with the City's well defined prior commitments, undertakings, and the terms of the Housing Remedy Order.

15. Should the OHA determine that technical studies, including surveys, soil borings, etc. are required for the development of the long term housing plan, he shall promptly and in writing request same from the City Manager. Within three (3) business days of any such request, the City Manager shall respond in writing indicating (a) that the City shall provide the requested support or (b) an explanation of why the City declines voluntarily to provide the re-

quested support, or some of it. The OHA shall promptly submit any such negative response to the Court, with copies to the parties, for resolution.

16. Failure to implement the actions required by this Order shall be cause for entry of a finding of contempt against the City of Yonkers and against those City officials who, it is determined, have intentionally frustrated this Order. The City of Yonkers is hereby placed on notice that if the City is found to be in contempt of this Order or any provision hereof, it is the intent of this Court, in addition to any other sanctions which may appear to the Court to be appropriate, to impose a fine for each day of non-compliance. It is further the present intent of this Court that said fine be at a daily rate pursuant to the following formula: (a) $100 for the first day of non-compliance after entry of a finding of contempt and notice; (b) the daily rate shall be doubled for each consecutive day of non-compliance. Said fine shall be payable by a check drawn to the "Clerk, Southern District of New York" and the City Manager shall cause said check to be delivered to the Clerk of the Court by 4:30 P.M. on each day that the Clerk's Office is open representing the amount of the fine incurred for the previous day. The check to be delivered on a Monday shall include any fines incurred with respect to days on

which the Clerk's Office was not open. The proceeds of said checks shall be paid into the Treasury of the United States for general purposes and shall not be earmarked, escrowed, or otherwise allocated for any special purpose of fund. The amount of funds previously paid shall not be refundable. The City of Yonkers is directed to furnish a copy of this Order forthwith to the Emergency Financial Control Board for the City of Yonkers.

17. The City is also hereby placed on notice that this Court shall take those actions, as specified herein or otherwise determined to be required, to implement the Housing Remedy Order, regardless of the City's continued non-compliance. As set forth in paragraph 16 hereof, non-compliance by the City of Yonkers may result in a finding of contempt and appropriate sanctions against the City and its officials. However, such non-compliance shall not thwart or frustrate implementation of the Housing Remedy Order and whenever feasible and appropriate the Court may, in its discretion, itself act or direct others to act with the same force and effect as if those actions had been taken by Yonkers itself.

18. Without prior written approval of this Court, the City of Yonkers shall issue no building permits with respect to any City-owned or controlled land or property.

Without prior written approval of this Court, the City of Yonkers shall not sell, transfer or otherwise encumber any City-owned or controlled property.

SO ORDERED.

EXHIBIT K—Opinion of United States Court of Appeals for the Second Circuit, Dated September 22, 1988.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1504, 1505—August Term, 1987

(Argued: July 20, 1988 Decided: September 22, 1988)

Docket Nos. 88-6140, -6146

YONKERS RACING CORPORATION and
ST. JOSEPH'S SEMINARY AND COLLEGE,

Petitioners-Appellants,

—v.—

CITY OF YONKERS,

Respondent-Appellee,

—and—

UNITED STATES OF AMERICA and
YONKERS BRANCH, NAACP, *et al.*,

Intervenors-Appellees.

Before:

ALTIMARI and MAHONEY, *Circuit Judges*,
and KORMAN, *District Judge*.*

* The Honorable Edward R. Korman, United States District Court for the Eastern District of New York, sitting by designation.

Appeals from an order denying petitioners-appellants' motions to remand to state court, following removal, Article 78 proceedings commenced in the Supreme Court of the State of New York, Westchester County and from an order denying and dismissing on the merits petitions for relief pursuant to Article 78, entered in the United States District Court for the Southern District of New York (Leonard B. Sand, *Judge*).

Affirmed in part, vacated and remanded in part. Judge Mahoney dissents in a separate opinion.

ROBERT D. MEADE and MICHAEL J. TRAINOR, White Plains, New York (Bleakley & Schmidt, White Plains, New York, of counsel), *for Petitioners-Appellants*.

MICHAEL W. SCULNICK, New York, New York (Stanley R. Strauss, Vedder, Price, Kaufman, Kammholz & Day, New York, New York; Paul W. Pickelle, Corporation Counsel, City of Yonkers, Yonkers, New York; Rex E. Lee, Carter G. Phillips, Mark D. Hopson, Gary I. Resnick, Sidley & Austin, Washington, D.C., of counsel), *for Respondent-Appellee*.

LINDA F. THOME, Attorney, United States Department of Justice, Washington, D.C. (Wm. Bradford Reynolds, Assistant Attorney General, David K. Flynn, Attorney, Department of Justice, Washington,

D.C., of counsel), *for Intervenor United States of America.*

MICHAEL H. SUSSMAN, Counsel, Yonkers Branch, NAACP, Yonkers, New York (Sussman & Sussman, Yonkers, New York, of counsel), *for Intervenors Yonkers Branch, NAACP, et al.*

ALTIMARI, *Circuit Judge*:

These two separate appeals, which we have consolidated for purposes of this opinion, follow from the housing remedy portions of a prior judgment, entered in the United States District Court for the Southern District of New York (Sand, *J.*), finding the City of Yonkers (the "City" or "Yonkers") liable for a pattern and practice over a span of forty years of deliberately concentrating federally subsidized low income housing in the southwest quadrant of Yonkers in order to maintain racial segregation, and ordering Yonkers, *inter alia*, to provide sites for 200 units of public housing in nonminority areas of the city. *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985), and Housing Remedy Order, 635 F. Supp. 1577 (S.D.N.Y. 1986), *aff'd*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 2821 (1988).

This case concerns the consent decree ("Consent Decree") reached between the City of Yonkers, the United States and the Yonkers chapter of the National Association for the Advancement of Colored People (NAACP) designating 7 public housing sites for 200 units of housing east of the Saw Mill River Parkway. Two of these sites currently are owned by petitioners-appellants Yonkers

Racing Corporation (the "Raceway") and St. Joseph's Seminary and College (the "Seminary"), respectively. Pursuant to the terms of the Consent Decree approved by the Yonkers city council (the "City Council") and entered by the district court on January 28, 1988, the City initiated, under pain of contempt, condemnation proceedings in state court against the Raceway and Seminary sites. Thereafter, the Raceway and the Seminary filed separate petitions against the City in the Supreme Court of the State of New York, Westchester County, pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR), seeking to enjoin the condemnation of their respective properties. On May 27, 1988, Judge Sand ordered the City of Yonkers to remove the Article 78 proceedings to the district court.

The Raceway and the Seminary appeal from an order denying their motions to remand the Article 78 proceedings back to state court and from an order dismissing their Article 78 petitions on the merits. The district court held that removal was authorized under the federal removal statutes, 28 U.S.C. §§ 1441, 1443, and the All Writs Act, 28 U.S.C. § 1651. In addition, the court determined that the extraordinary nature of the proceedings warranted application of statutory exemptions from the notice, hearing and review requirements of the New York Eminent Domain Procedure Law (EDPL) and from the provisions of the State Environmental Quality Review Act (SEQRA). The district court also found that, even if such exemptions did not apply, there was such substantial compliance with the notice, hearing and review provisions of state law that petitioners' statutory rights were not violated. Finally, the district court considered the Seminary's first and fourteenth amendment free exercise challenge to the taking of its property and held that, since the inclusion of the Semi-

nary's property was an integral part of the Consent Decree and thus essential to efforts designed to remedy racial segregation in housing, no valid claim for a violation of the first amendment had been advanced.

On appeal, the Raceway and the Seminary principally contend that removal was improper under the federal removal statutes and the All Writs Act since only a defendant is permitted to remove and the City of Yonkers was a plaintiff, not a defendant, in the underlying condemnation proceedings. Petitioners further contend that not only are the exemptions to the EDPL and SEQRA inapplicable but that full compliance with the notice, hearing and review provisions of the statutes is required. The Seminary separately argues that the district court erred in rejecting its free exercise defense to the condemnation of its property without the benefit of a hearing to determine whether other reasonable alternatives exist to the taking of religiously owned and used property.

For the reasons that follow, we affirm the district court's order denying petitioners' motions to remand for lack of federal removal jurisdiction, but solely on the authority of the All Writs Act. We also affirm the court's order dismissing the Article 78 petitions in all respects except with regard to the Seminary's first amendment challenge to the taking of its property which is remanded to the district court for further consideration.

BACKGROUND

The underlying facts of the Yonkers litigation are set forth in exhaustive fashion in Judge Kearse's recent opinion affirming the district court's finding of liability against the City under both Title VIII of the Civil Rights Act of

1968 (the "Fair Housing Act"), 42 U.S.C. § 3601 *et seq.*, and the equal protection clause of the fourteenth amendment, and therefore need not be restated here. For our purposes, it suffices simply to emphasize that this court concluded, as did Judge Sand, that " 'the extreme concentration of subsidized housing that exists in Southwest Yonkers today is the result of a pattern and practice of racial discrimination by City officials, pursued in response to constituent pressures[,] to select or support only sites that would preserve existing patterns of racial segregation, and to reject or oppose sites that would threaten existing patterns of segregation.' " 837 F.2d at 1194 (quoting 624 F. Supp. at 1373).

To remedy the statutory and constitutional violations, the district court in part ordered the City to fulfill its pre-existing commitment with the Department of Housing and Urban Development (HUD) to provide sites for 200 units of public housing east of the Saw Mill River Parkway funded by HUD's Community Development Block Grant program. 635 F. Supp. at 1580. Following this court's affirmance of the housing remedy order, the City, in January 1988, entered into extensive negotiations with the Department of Justice and the NAACP concerning compliance by the City with its obligation under the Housing Remedy Order to designate public housing sites. Under threat of contempt sanctions by the district court for non-compliance with the Housing Remedy Order, the City eventually reached an agreement with the Department of Justice and the NAACP designating 7 sites on which to build a total of 200 units of public housing. The agreement was incorporated into the Consent Decree which required the City to initiate eminent domain proceedings, if necessary, to acquire these sites within 60 days. As part of the Consent Decree, HUD was to review and approve the

housing sites while the City was in the process of acquiring title to the 4 designated properties which were privately owned. Within 80 days of the entry of the decree, final HUD approval was to have been obtained and the City was to have solicited proposals from developers for construction of the housing.

Two of the privately owned properties included the Raceway site, a 1.2-acre parcel now used as a parking lot and currently slated for 24 units of housing, and the Seminary site, a 2-acre parcel on the border of the Seminary's 44-acre property and also currently slated for 24 units of housing. On January 25, 1988—the date that the City reached agreement with the United States on the Consent Decree—the Roman Catholic Archdiocese of New York on behalf of the Seminary issued a statement concerning the designation of the Seminary site:

> The Archdiocese of New York has been informed that there has been a recent decision to build units of affordable housing upon property now belonging to the Archdiocesan Major Seminary, Saint Joseph's, in the Dunwoodie section of Yonkers. Since it has been decided to proceed with these plans, the Archdiocese will do everything possible to promote the success of the effort. . . .

Advised of the Cardinal's intent to facilitate the construction of public housing on the Seminary site, Judge Sand welcomed the Church's participation and support. A month later, the City of Yonkers, pursuant to the terms of the Consent Decree, made offers of purchase to the owners of each privately owned site; the Archdiocese rejected the City's offer on March 18, 1988. On March 21, John Cardinal O'Connor wrote to Judge Sand stating that while the Archdiocese supported the addition of public housing

in Yonkers, it believed there were "serious problems in the current plan." Cardinal O'Connor expressed concern that four of the seven housing sites would be located in one parish in southeast Yonkers. The Cardinal also objected to the public perception that he had "volunteer[ed]" the Seminary site. His Eminence explained that he had decided in January to " 'yield graciously' " to the City, apparently believing (albeit erroneously, as it later became apparent) that the Seminary site would be condemned with or without his consent.

The district court responded by suggesting that the City and the Archdiocese consider substituting an alternate site in place of the Seminary property. In the interim, the court ordered the City of Yonkers to initiate eminent domain proceedings against the Seminary as well as against the Raceway, which also had rejected the City's offer to purchase its property. On April 24, 1988, two days after the City filed condemnation petitions in state court, the Cardinal declared that the Consent Decree was "fatally flawed." In addition, he said he was "deeply resentful" of the process which led to the condemnation action and which put the Archdiocese in the "humiliating position" of being perceived as "so resistant to making the property available that the court had to require the city to condemn the property."

The City of Yonkers then attempted to vacate the Consent Decree on the basis of a "mutual mistake" between the City Council and the Archdiocese. In support of its motion to vacate under Fed. R. Civ. P. 60(b) dated May 2, 1988, the City argued that the Cardinal's endorsement of the Consent Decree and his willingness to sell the Seminary site had been essential to the City's approval of the decree—the support of the Catholic Church being critical

in order to achieve acceptance of the housing plan by the City's residents, a substantial proportion of whom are Catholic. At oral argument on the motion to vacate, the district court determined that while the Cardinal's support for the Consent Decree had been a "welcome occurrence," it had not been so crucial that his subsequent withdrawal of support was sufficient to invalidate the decree. In any event, the court noted that, even assuming there had been a mistake, the proper course of action for the City was simply to propose a modification of the Consent Decree designating an alternative to the Seminary site. Judge Sand thereupon directed the City to meet with the Archdiocese to see if some accommodation could be reached.

Meanwhile, the Seminary and the Raceway filed answers with affirmative defenses to the condemnation petitions, and on May 11, 1988, instituted Article 78 proceedings against the City claiming that the proposed condemnations were "null and void." The parties also sought injunctive relief preventing the City from acquiring the two sites. By the end of May, once it became clear that the City and the Archdiocese had failed to reach any agreement regarding the designation of an alternate housing site and that the City Council would not propose any modification of the Consent Decree, the United States filed an order to show cause in the district court seeking removal of the Article 78 proceedings from state court. On May 27, 1988, the district court granted the order directing the City to remove the Article 78 proceedings to federal court and permitted the United States and the NAACP, plaintiffs in the underlying civil rights litigation, to intervene as respondents.

In ordering removal of the Article 78 proceedings, the district court explained:

> During the informal discussions which preceded entry of the consent decree, the question was raised whether [the] condemnation proceedings should be commenced in [the district] court or in state court. It was then the understanding of the parties that the sole issue which would be present in the condemnation proceedings related to value, that is, the amount to be paid to the property owner whose land was condemned by the City of Yonkers in implementation of the housing remedy order. It was with that understanding and intention that the consent decree did not contain a provision requiring that the condemnation proceedings go forward in [the district] court. . . .

Judge Sand also found a "significant risk" if removal were not ordered that the City of Yonkers "[would] be confronted with inconsistent orders from two courts [—] . . . an order of [the district] court to proceed with the condemnation of the two properties, and an order of [the] state court either not to proceed with that condemnation or to proceed pursuant to [procedures] and a timetable . . . inconsistent with [that] established by [the district] court." While the All Writs Act was, according to Judge Sand, to be invoked only as a "last resort," the court determined that, rather than allow the parties to go forward in state court knowing full well that there would be resort to the district court for injunctive relief against the implementation of any state court order inconsistent with the Consent Decree, the "more appropriate procedure" was for the district court to exercise removal jurisdiction over the Article 78 proceedings in the first instance. In sum, the court characterized the Article 78 proceedings as a "classic case" for invocation of the All Writs Act to effectuate removal.

Following removal, petitioners filed motions to remand the Article 78 proceedings to state court. On June 8, 1988, the district court heard argument from counsel on the motions to remand, the merits of the Article 78 proceedings and the City's motion to vacate the Consent Decree. With regard to the motions to remand, the court held that removal was authorized under the general federal removal statute, 28 U.S.C. § 1441, the civil rights removal statute, 28 U.S.C. § 1443, and the All Writs Act. The court further stated that removal was appropriate because the petitioners' defenses to the condemnations were best litigated in federal court with the benefit of an existing record, that removal would not deprive petitioners of their right to be heard on the merits of their Article 78 petitions, and that removal would eliminate the possibility of inconsistent orders from two courts.

On the merits of the Article 78 petitions, the district court concluded that the "emergency situation" provision of section 206(D) of the EDPL applied in the instant case to exempt the City of Yonkers from compliance with the notice, hearing and review requirements of the statute, and that the proposed condemnations were exempt from SEQRA pursuant to the court order provisions of SEQRA's implementing regulations. 6 NYCRR § 617.2(q). Moreover, according to the district court, the process by which the public housing sites were designated and reviewed constituted substantial compliance with the purposes of the notice, hearing and review requirements of state law.

As for the Seminary's free exercise challenge, the district court indicated that aside from the issue of the validity of the Seminary's claim of a protectible religious purpose for the two-acre site under the first amendment,

the alleged interference with the pastoral contemplative atmosphere of the only seminary in the Archdiocese had to be balanced against the need to vindicate the federal constitutional rights of those citizens of Yonkers who have been denied fair housing. In striking the balance in favor of vindication of fair housing rights, the court found the inclusion of the Seminary site in the Consent Decree to be essential.

Accordingly, the district court denied petitioners' motions to remand and the City's motion to vacate the Consent Decree,[1] dismissed the Article 78 petitions, and ordered the Seminary and the Raceway to "present to [the state c]ourt a proposed order stating that, insofar as all substantive grounds for objection to the proceedings in question have been . . . resolved in [federal c]ourt, . . . the eminent domain proceedings shall go forward in accordance with State law . . . to determine the sole remaining issue of valuation of [the] properties."

DISCUSSION

I. JURISDICTION

A. The Removal Statutes

Section 1441(a) of Title 28 provides in pertinent part that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the *defendant* . . ., to the district court . . . for the district . . . where such action is pending" (emphasis added). The civil rights removal statute, 28 U.S.C. § 1443(2), provides in pertinent part that any civil action commenced in state court "[f]or any act

1 The City of Yonkers has not sought appellate review of the denial of its motion to vacate the Consent Decree and indeed is precluded from doing so under the terms of that decree.

under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law" may be removed "by the *defendant* to the district court . . . for the district . . . embracing the place wherein it is pending" (emphasis added).

The initial question to be considered on this appeal is whether the City of Yonkers was correctly deemed by the district court to be a defendant for removal purposes under either statute. Appellants argue that Yonkers was not a proper party to petition the state court to remove the Article 78 proceedings since it was the plaintiff in the underlying condemnation proceedings, and the Article 78 proceedings were merely state law procedural vehicles for raising defenses to the condemnation petitions. *See Matter of Piotrowski v. Town of Glenville*, 101 A.D.2d 654, 475 N.Y.S.2d 511, 512 (3d Dep't 1984) (defenses to condemnation action are properly brought via an Article 78 proceeding); *but cf. Town of Coxsackie v. Dernier*, 105 A.D.2d 966, 482 N.Y.S.2d 106, 107 (3d Dep't 1984) (challenge to condemnation may be made by way of an answer in that proceeding). In this regard, appellants cite two Supreme Court decisions, *Mason City & Fort Dodge R.R. v. Boynton*, 204 U.S. 570, 579-80 (1907) and *Chicago, Rock Island & Pac. R.R. v. Stude*, 346 U.S. 574, 580 (1954), for the proposition that, regardless of the state's procedural provisions, where a party seeks to remove a condemnation proceeding to federal court, the condemnor is the plaintiff and the condemnee is the defendant.

The United States and the NAACP,[2] intervenors herein, respond by pointing out that the actions removed from

2 In the district court, the City of Yonkers opposed Judge Sand's assertion of removal jurisdiction over the Article 78 proceedings. In its

state court were the Article 78 proceedings, not the underlying condemnation proceedings. Indeed, the condemnation actions are still pending in state court. In the Article 78 proceedings, the City of Yonkers clearly was the defendant. Intervenors argue that the Article 78 actions were separate proceedings from the condemnation actions and that the *Mason City* and *Chicago, Rock Island* decisions are distinguishable.

Both Supreme Court decisions cited by appellants involved Iowa eminent domain statutes under which the condemnee was required to initiate a proceeding contesting the assessment of the condemned property's value arrived at by a sheriff's jury. In that separate proceeding, the condemnee was the plaintiff under state law. In each case, the Supreme Court held that in construing the removal statute, federal law determined who was the plaintiff and who was the defendant, *Chicago, Rock Island*, 346 U.S. at 580; *Mason City*, 204 U.S. at 579; *see Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104 (1941) (state procedural law cannot supersede privilege of removal granted by federal statute), and that the condemnor remained the plaintiff for purposes of removal.

Intervenors contend that the Article 78 proceedings were fundamentally different from the state court actions in *Mason City* and *Chicago, Rock Island*, which constituted challenges to property valuations. Their argument

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brief on appeal, the City has again questioned whether the district court properly "divest[ed] the New York Supreme Court of jurisdiction to resolve the Article 78 proceedings." The City of Yonkers Brief at 8. Nevertheless, because in the City's view, "it would be wasteful to require the matters to be relitigated in the state court," *id.* at 9, the City has argued on appeal in favor of an affirmance on the jurisdictional issue as well as on the disposition of the merits of the Article 78 petitions.

essentially is that the issues decided in the removed Article 78 proceedings—whether the City complied with state procedural requirements, whether the sites were properly designated, and whether the condemnation of the Seminary site violated the first amendment—were separate issues resolvable apart from the question of the valuation of appellants' properties, the sole remaining question in the condemnation actions. On the other hand, as appellants persuasively point out, the defenses they raised in their answers to the condemnation petitions were identical to their claims in the Article 78 petitions.

In view of the foregoing, we have serious doubts in light of *Mason City* and *Chicago, Rock Island* whether the removal statutes provided a proper basis to compel the City of Yonkers to remove the Article 78 proceedings to federal court. Quite simply, a party who is in the position of a plaintiff cannot remove. *Cf. White v. Wellington*, 627 F.2d 582, 586 (2d Cir. 1980) ("right to remove is statutory, jurisdictional and absolute"). Nevertheless, we need not resolve this difficult question since the district court asserted an independent basis for removal jurisdiction under the All Writs Act. We turn now to consideration of removal under that statute.

B. The All Writs Act

The All Writs Act (the "Act") provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Act "authorizes a federal court in exceptional circumstances to issue such orders to persons 'who, though not parties to the original action or engaged in wrongdoing, are *in a position to frustrate* the implementation of a court order or the proper administration of justice, and encompasses

court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *New York Telephone Co.*, 434 U.S. at 172; *accord Pennsylvania Bureau of Correction*, 474 U.S. at 40.

The obligation of the City of Yonkers under the Constitution of the United States to remedy violations of civil rights is paramount. *See, e.g., Cooper v. Aaron*, 358 U.S. 1, 18-20 (1958); *Brown v. Board of Educ. II*, 349 U.S. 294, 300-01 (1955). The fact that petitioners were not parties to—and in their words "had absolutely no connection with"—the underlying discrimination lawsuit is of little consequence. The Raceway and the Seminary are in a position now—whether willingly or not—to frustrate implementation of the Consent Decree. We believe this is just the sort of extraordinary circumstance envisioned by the All Writs Act.

This court previously has held that the All Writs Act enables a federal court in an exceptional case to exercise its "residual jurisdictional authority" to issue orders against non-parties to a civil rights action in order to vindicate the constitutional rights of existing parties. *See Benjamin v. Malcolm*, 803 F.2d at 53. In *Benjamin*, we affirmed an order of the district court joining, as third-party defendants pursuant to Fed. R. Civ. P. 19(a) and the All Writs Act, state officials who were " 'in a position to frustrate the implementation of a court order' " to alleviate overcrowding in New York City's detention center on Rikers Island. *Id.* (quoting *New York Telephone Co.*, 434 U.S. at 174). In rejecting the state's claim that the district court could not assert jurisdiction over state officials under the All Writs Act, we noted that the district court "was faced

with the necessity of acting immediately to relieve already-adjudicated unconstitutional conditions . . . and of avoiding the delay that would be entailed in the relitigation of those conditions." *Id.* Consequently, we held that exceptional circumstances justified the exercise of jurisdiction under the All Writs Act.

In the instant case, the record indicates that had the district court known from the outset that the Raceway and the Seminary would challenge the designation of their properties for condemnation as "null and void," the Consent Decree would have included a provision requiring that the condemnation proceedings be instituted in federal court, presumably under the "residual jurisdictional authority" of the All Writs Act. In retrospect, the assertion by the district court of jurisdiction in the first instance over the condemnation of petitioners' properties might have been a better course of action. We certainly would be less troubled by the use of the All Writs Act to initiate the condemnation proceedings in federal court had Judge Sand deemed petitioners to be necessary third parties to the implementation of the Consent Decree in the underlying civil rights litigation. Nevertheless, we must decide the case before us, and as a practical matter we see no reason why it is any less "necessary or appropriate" at this stage of the proceedings to invoke the authority of the All Writs Act. *Cf. In re Baldwin-United Corp.*, 770 F.2d 328, 337 (2d Cir. 1985) (using All Writs Act to enjoin non-parties from *commencing* actions in state court where such proceedings would "threaten[ ] to frustrate proceedings in a federal action"). Moreover, were we to decide that removal was improper under the All Writs Act, the state court would be faced with a situation in which any order it issued that was inconsistent with the Consent Decree would be subject to the injunctive powers of the federal

court under the exception provisions of the Anti-Injunction Act. *See* 28 U.S.C. § 2283 (federal court may not grant injunction against state court "except as expressly authorized by . . . Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments"); *see also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 501 F.2d 383, 384 (4th Cir. 1974) (possibility of "conflicting orders from state and federal courts" sufficient to warrant injunctive relief against state court under 28 U.S.C. § 2283). Use of the All Writs Act in this case to effectuate removal thus seems to us to be a less drastic, and therefore preferable, result.

In sum, we agree with the district court that this is indeed an exceptional case. While we too have confidence in the "ability, objectivity, [and] integrity of the state court" to render an appropriate decision in an Article 78 proceeding, the fact remains, as the district court recognized, that "the issues raised [by the Article 78 proceedings] go to the very essence" of the Consent Decree. If this case simply involved ordinary condemnation proceedings collateral to the implementation of the housing remedy order, that would be one thing. *Cf. Pennsylvania Bureau of Correction*, 474 U.S. at 40 (All Writs Act does not authorize federal court to order United States Marshals "to transport state prisoners from state prisons to the federal courthouse *in the ordinary course of litigation*") (emphasis added). But as the United States has recognized, "[t]he City's condemnation petitions, initiated pursuant to court order, must be seen in the context of the *Yonkers* [civil rights] litigation. The condemnor here is not the City acting in isolation[,] but the City acting at the behest of the court[,] the *Yonkers* plaintiffs and . . . 'the people who have been deprived of opportunities for housing free of racial discrimination.' " Department of Justice Brief at 37

(quoting Judge Sand, Transcript of Proceedings, June 8, 1988).

Despite the City's assurances through its counsel that it would vigorously defend against the Article 78 petitions, we have serious doubts whether a reluctant condemnor, which at every opportunity has resisted implementation of the Housing Remedy Order, could be counted on in state court to adequately protect the integrity of the Consent Decree. To believe otherwise would be to ignore the fact that Yonkers entered into the Consent Decree and instituted the condemnation proceedings only after being threatened by the district court with sanctions for contempt. "One must realistically deal with the fact," Judge Sand explained, "that the positions which the city would be compelled to take in [state court] would be significantly contrary to positions taken by [it] in [the district] court." The inconsistency of these positions convinces us, therefore, of the necessity to exercise removal jurisdiction to prevent frustration of the Housing Remedy Order.

Accordingly, we hold that removal was proper under the All Writs Act. We do so because removal was necessary to protect the integrity of the Consent Decree and because the issues raised by the Article 78 petitions cannot be separated from the relief provided by the Consent Decree. *Cf. Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 501 F.2d at 384 (affirming issuance of injunction under Anti-Injunction Act because "issues being litigated in the state court proceeding could not be separated from the issues and relief involved in the federal court suit"). The implementation of that decree takes precedence over petitioners' desire to have the defenses to the condemnation of their properties litigated in state court. *Cf. North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45

(1971). Given the exceptional circumstances presented here, it is clear that the power of the All Writs Act extended over petitioners who were "in a position to frustrate the implementation" of the Consent Decree. *New York Telephone Co.*, 434 U.S. at 174. If the power exists to issue extraordinary orders under the Anti-Injunction Act and the All Writs Act to prevent the prosecution of state proceedings, surely in this case it also exists to effectuate removal notwithstanding the availability of an independent basis for the exercise of jurisdiction under the federal removal statutes. In any event, by removing the Article 78 proceedings to federal court, petitioners are not being deprived of their statutory right to assert defenses to the taking of their properties; they are merely being prevented from litigating those defenses in state court. We conclude, therefore, that because of the significant risk of inconsistent decrees from two courts, it was "necessary or appropriate" for the district court to invoke the residual jurisdictional authority of the All Writs Act.

II. THE MERITS OF THE ARTICLE 78 PETITIONS

A. EDPL

The Raceway and the Seminary contend on the merits that the City failed to comply with the notice, hearing and review requirements of Article 2 of New York's Eminent Domain Procedure Law (EDPL). In its condemnation petitions, the City claimed to be exempt from compliance with the procedural requirements of the statute pursuant to the "emergency situation" provision of EDPL § 206.

Section 201 of the EDPL provides that, "prior to acquisition, the condemnor, in order to inform the public and to review the public use to be served by a proposed public project and the impact on the environment and residents

of the locality where such project will be constructed, shall conduct a public hearing." The hearing must be held on at least ten days prior notice, EDPL § 202, and following the hearing, the condemnor is required, within ninety days, to make findings and a determination of the public purpose to be served by the proposed condemnation. EDPL § 204. The factors to be considered in making such determination and findings include:

> (1) the public use, benefit or purpose to be served by the proposed public project;
>
> (2) the approximate location for the proposed public project and the reasons for the selection of that location;
>
> (3) the general effect of the proposed project on the environment and residents of the locality;
>
> (4) such other factors as [the condemnor] considers relevant.

Id. § 204(B).

A condemnor is exempt from compliance with the provisions of Article 2 of the EDPL when, *inter alia*, "because of an emergency situation the public interest will be endangered by any delay caused by the public hearing requirement in this article." *Id.* § 206(D). The district court found that "[c]ontrary to the claims of St. Joseph's and the Raceway, the City of Yonkers, in a very real sense, *is* faced with an emergency" (emphasis in original). As the court further explained, "[t]his matter must end" because it is "tearing Yonkers apart and Yonkers is bleeding."

We believe that the district court's factual finding of such an "emergency situation" is amply supported by the record. *See id.* § 207(C)(3), (4) ("scope of the review shall

be limited to whether . . . determination and findings were made in accordance with procedures set forth in [Article 2], and [whether] a public use, benefit or purpose will be served by the proposed acquisition"); *see also Gerges v. Koch*, 62 N.Y.2d 84, 476 N.Y.S.2d 73 (1984) (emergency situation presented by prison overcrowding warranted temporary exemption under New York City's Environmental Quality Review (CEQR) procedures, which parallel provisions of SEQRA, from filing environmental impact statement in order to begin renovation and construction of facilities as remedy for deprivation of constitutional rights of prisoners); *Board of Visitors-Marcy Psychiatric Center v. Coughlin*, 60 N.Y.2d 14, 466 N.Y.S.2d 668 (1983) (same, except pursuant to SEQRA); *City of Yonkers v. Hvizd*, 93 A.D.2d 887, 461 N.Y.S.2d 408 (2d Dep't 1983) (existence of emergency situation endangering public interest warrants application of EDPL 206(D) exemption); *Matter of Village of Malverne*, 70 A.D.2d 920, 418 N.Y.S.2d 93 (2d Dep't 1979) (same). More than two years after the issuance of the Housing Remedy Order and eight years since the commencement of the civil rights action, no housing remedy has been implemented. The public interest cannot wait any longer. We thus agree with the district court that the "1200 people on the waiting list for public housing in Yonkers have a right to a remedy," and in our judgment any further delay—aside from that which is necessary to address the first amendment claim of the Seminary as discussed in Part II. C. below—would be intolerable.

Appellants maintain that the only emergency in this case is the result of Yonkers own intransigence, and consequently that full compliance with the terms of the statute cannot be excused. We disagree. An assessment of blame regarding the predicament in which Yonkers presently

finds itself is quite frankly irrelevant to a determination of whether or not Yonkers is faced with an "emergency situation" under the statute. *Cf. Gerges*, 62 N.Y.2d at 95, 476 N.Y.S.2d at 78 (that municipal officials "might have foreseen and . . . made appropriate provision for . . . resolution" of emergency situation regarding constitutionally inadequate prison facilities "does not negate the existence of the present crisis"). Indeed, the very purpose of the exemption provisions under Article 2 of EDPL is to excuse compliance with the procedural requirements of the statute when the public interest so requires. *See City of Buffalo Urban Renewal Agency v. Moreton*, 100 A.D.2d 20, 473 N.Y.S.2d 278, 281 (4th Dep't 1984); *see also Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 503 N.Y.S.2d 298, 305 (1986) ("principal purpose of Article 2 . . . is to ensure that [the condemnor] does not acquire property without having made a reasoned determination that the condemnation will serve a valid public purpose").

Appellants concede that the construction of low income housing in Yonkers required by the Housing Remedy Order would serve a valid public purpose. In addition, as the district court stated, "[t]he process by which the public housing sites designated in the Consent Decree were determined, the notoriety of that process, the review already given to those sites and the continuing review . . . by HUD certainly satisfied the substance of the State law provisions upon which St. Joseph's and the Raceway predicate their claims." *See also Aswad v. City School Dist.*, 74 A.D.2d 972, 425 N.Y.S.2d 896, 898 (3d Dep't 1980) (holding that "substantial compliance" with exemption provisions of section 206 and four factors enumerated in section 204(B) was sufficient to confirm proposed condemnation). We agree that there was substantial compliance with the requirements of the EDPL in this case. During extensive

proceedings before the district court, the City's independent planning experts, the court-appointed Outside Housing Advisor, the Municipal Housing Authority and the City's Community Development Agency all participated in a thorough review of the location, distribution and suitability of the designated sites. With regard to the "general effect" of the proposed condemnations "on the environment and residents of the locality," EDPL § 204(B)(3), HUD conducted a preliminary evaluation as part of its ongoing review of the sites and reported to the district court that the housing plan appeared to meet site, neighborhood and environmental standards for public housing. *See generally* 24 C.F.R. § 941.202 (1988).

Consequently, given the undisputed public purpose inherent in the implementation of the Housing Remedy Order and the nature and extent of the review process, we are convinced that there was a valid determination that the proposed condemnations would be in the public interest as required under Article 2 of the EDPL.

B. SEQRA

The New York State Environmental Quality Review Act (SEQRA), Environmental Conservation Law (ECL) § 8-0101 *et seq.*, requires the preparation of an environmental impact statement (EIS) by state and local agencies "on any action they propose or approve which may have a *significant effect* on the environment." *Id.* § 8-0109(2) (emphasis added). Pursuant to regulations adopted thereunder, the Department of Environmental Conservation has determined the types of actions having such a "significant effect" ("Type I" actions) for which an EIS must be prepared. 6 NYCRR § 617.12. When an EIS is required, the full panoply of procedures prescribed under SEQRA comes into play. *See* ECL § 8-0109. If, on the other hand,

it is determined that the proposed action is one not likely to have a significant effect on the environment ("Type II" action), then such action "do[es] not require [an] environmental impact statement[ ] or any other determination or procedure" under SEQRA. 6 NYCRR § 617.13; *see Jackson v. New York State Urban Dev. Corp.*, 67 N.Y.2d 400, 503 N.Y.S.2d 298, 304 (1986) ("the heart of SEQRA is the [EIS] process"); *see also* CPLR § 7803(3) (scope of review is limited to whether determination was "arbitrary[,] capricious or an abuse of discretion").

Although appellants concede that the proposed condemnations of the two sites are not Type I actions requiring the preparation of an EIS, *see* 6 NYCRR § 617.12(b), they argue nonetheless that an environmental assessment of the proposed condemnations should have been made to determine if there would be a significant impact on the environment. *See* ECL § 8-0109(4); 6 NYCRR § 617.6(a)(1)(i). However, as indicated in Part II. A. above, HUD is in the process of conducting an environmental review of the proposed housing sites pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq*. *See* 24 C.F.R. § 941.208(b) (1988); *see also* EDPL § 204(B)(3) (requiring consideration by condemnor of "the general effect of the proposed project on the environment"). Thus, the environmental assessment that appellants seek is in fact taking place.

In any event, we agree with the district court that the proposed condemnations of the Raceway and the Seminary sites are exempt from compliance with SEQRA. The implementing regulations to SEQRA expressly provide an exemption for actions "required to be undertaken pursuant to a judgment or order" and for "actions . . . of any court." 6 NYCRR § 617.2(q)(1), (5). Accordingly, in view

of the fact that the City was compelled by a federal court order to institute condemnation proceedings against the subject properties and that there was, as the district court found, a "meticulous inquiry" regarding environmental factors, we conclude that the requirements of SEQRA were satisfied in all respects.

C. The First Amendment

We come finally to the Seminary's challenge to the condemnation of its property on first amendment grounds.[3] In its Article 78 petition, the Seminary alleged that "[b]y the inclusion of the subject property in the [Consent Decree] and by the commencement of the condemnation proceeding, [the City] has attempted to regulate the use of church owned property without any compelling public interest and has sought the acquisition of the subject property in violation of . . . the First and Fourteenth Amendments to the United States Constitution." The Seminary's position is that, because the district court recognized on a number of occasions the availability of suitable alternate sites to the Seminary parcel and repeatedly stated its willingness to modify the Consent Decree should the City designate such an alternate site, no compelling need existed to justify the proposed condemnation of the Seminary's property.

3 The Seminary also challenges the proposed taking of its property under Article I, § 3, of the New York State Constitution. The Seminary did not make any argument in the district court or in its brief on appeal, however, based specifically on New York law. We thus are afforded no grounds to consider whether New York's "free exercise and enjoyment of religious . . . worship" clause provides any broader protection than the first amendment regarding the City's proposed acquisition of the Seminary site, *cf. Brown v. McGinnis*, 10 N.Y.2d 531, 225 N.Y.S.2d 497 (1962), and proceed therefore to consider just the Seminary's federal constitutional claim.

The first amendment provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I; *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (first amendment free exercise clause is applicable to states through fourteenth amendment). In order to show that a particular governmental action implicates the free exercise clause, the aggrieved party must show that the challenged action—in this case, the condemnation of church-owned property—would coerce a violation of religious beliefs or would penalize the practice of religion by denying the aggrieved party "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 108 S. Ct. 1319, 1325 (1988). *See also School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) (coercion); *Sherbert v. Verner*, 374 U.S. 398, 402-06 (1963) (penalty). The state may, however, justify any such limitation on religious liberty by showing that its action is essential to accomplish an overriding or compelling governmental interest. *See, e.g., Hobbie v. Unemployment Appeals Comm'n of Florida*, 107 S. Ct. 1046, 1049 (1987); *Bob Jones Univ. v. United States*, 461 U.S. 574, 603 (1983); *United States v. Lee*, 455 U.S. 252, 257-58 (1982).

The Seminary's free exercise challenge to the proposed taking of its property raises an issue which has only very rarely been presented. While the condemnation of church property for public use is not unheard of, *see, e.g., United States v. 564.54 Acres of Land, More or Less*, 506 F.2d 796 (3d Cir. 1974); *Foster v. Herley*, 491 F.2d 174 (6th Cir. 1974); *Kozemchak v. Ukrainian Orthodox Church of Am.*, 443 F.2d 401 (2d Cir. 1971), we are aware of no federal court case in which a religious organization has challenged the taking of real property on free exercise

grounds. The parties in the instant case, however, have discussed at some length a decision of the Colorado Supreme Court, *Pillar of Fire v. Denver Urban Renewal Auth.*, 181 Colo. 411, 509 P.2d 1250 (1973), in which this precise issue was considered, apparently for the first time.

In *Pillar of Fire*, an evangelical sect sought to enjoin a municipal urban renewal agency from condemning a church building said to have unique religious significance. The building was alleged to be *sui generis* and the birthplace of the Pillar of Fire denomination. However, the record contained no findings indicating that the trial court weighed the competing interests of church and state regarding the proposed condemnation. After expressing concern about "direct confrontations of the sort in this case [which] have been avoided because legislatures and administrative bodies have generally accorded *great respect* to religious organizations," 509 P.2d at 1254 (emphasis added), the Colorado Supreme Court remanded the case to the trial court for a full hearing. The court noted that the "loss of the Pillar of Fire [Church] would allegedly go far beyond the incidental burden of having to move to a new location" and, as a result of the competing interests involved, required that on remand a determination be made whether the state had a "substantial interest" in the taking of the alleged birthplace of the Pillar of Fire Church "without a reasonable alternate means of accomplishment" of its plans for urban renewal. *Id.* at 1253-54; *see Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); *cf. Father Flanagan's Boys' Home v. Millard School Dist.*, 196 Neb. 299, 242 N.W.2d 637 (condemnation of 40-acre tract of farmland owned by church would not substantially interfere with church's school program since more than 900 acres would remain after taking), *cert. denied*, 429 U.S. 887

(1976). Although the Colorado court conceded that church property could be taken by eminent domain for "paramount public use," 509 P.2d at 1254 (citation omitted), the court nonetheless concluded that the church was entitled to a hearing on the merits of its first amendment claim.[4]

In support of its claim of a free exercise infringement, the Seminary, during the June 8, 1988 proceedings before the district court, relied principally on an affidavit of Monsignor Edwin O'Brien, the Rector at St. Joseph's, who stated that the Seminary grounds, including the two acres designated for public housing, form an "apron" of quietude surrounding St. Joseph's and contribute to the "atmosphere of quiet reflection" essential to the "academic, spiritual, psychological and pastoral" preparation of young men for the priesthood. Monsignor O'Brien also averred that the two-acre site together with the remaining forty-two acres of church property have been used for religious purposes by the Archdiocese at least since the opening of the Seminary in 1896 and that "the construction of multi-family housing. . . . [would] substantially affect our work at St. Joseph's," the only facility in the Archdiocese for the training of new priests.

4 On remand, the trial court found that, despite Pillar of Fire's allegations to the contrary, the church property was neither the birthplace nor the mother church of the Pillar of Fire denomination. When the case returned to the Colorado Supreme Court on appeal, the court upheld the trial court's subsequent finding that the church property was not *sui generis* and also cited evidence from the record supporting the state's "weighty and substantial" need for the property. *Denver Urban Renewal Auth. v. Pillar of Fire*, 191 Colo. 238, 552 P.2d 23, 25 (1976). In the court's view, even had Pillar of Fire proven that the church building was *sui generis*, the record now indicated a substantial state interest in the condemnation of the building without an alternate means of accomplishing the urban renewal project. Accordingly, the Colorado Supreme Court affirmed the trial court's decision allowing the condemnation of the Pillar of Fire Church.

The district court considered without resolving the question of whether the taking of the Seminary's property would constitute an interference with the free exercise rights of the Archdiocese. Counsel for the Seminary argued before the district court that, because the use of the two acres would substantially affect the work at the Seminary, the condemnation of the site would violate the first amendment. He added, however, that that "doesn't mean . . . the church could not agree voluntarily . . . to the use of the property . . ., but [the property] is not going to be . . . willingly subjected to condemnation under this plan." Clearly perplexed by the "varying positions" of the Archdiocese regarding the inclusion of its property as part of the Consent Decree, the district court described the Seminary's claim of religious interference as equivocal: "if there [is] agreement by the Archdiocese with the overall plan, it [would] allow the use of this property, and that would not interfere with free exercise rights; but since the Archdiocese has reservations . . . with respect to the overall plan, it is resisting the taking on free exercise grounds." Nevertheless, the district court assumed the validity of the Archdiocese's claim of religious use of the property and proceeded to balance the competing interests of church and state, finding that the purported constitutional necessity to include the Seminary property into the Consent Decree outweighed the Seminary's first amendment rights.

The Seminary argues on appeal that "while it is very true that a remedy for the proven segregative policies of the City is necessary, it is just as true that the Seminary property is *not* necessary to that remedy." Reply Brief at 22 (emphasis in original). The Archdiocese further contends that the City's refusal to modify the decree because it believed there were no "politically acceptable" alternatives to the Seminary site is hardly a sufficient reason to

justify infringement of a first amendment privilege. In the Seminary's view, therefore, the district court's conclusion concerning the compelling need for the Seminary's property was simply not supported by the record.

Appellees respond first by claiming that under *Lyng* the Seminary was unable to show that the condemnation of its property would have a coercive or penal effect on the practice of religion. *See* 108 S. Ct. at 1325. In *Lyng*, members of three Indian tribes in northwest California challenged a United States Forest Service plan to build a paved 75-mile road connecting two towns, Gasquet and Orleans, on a 6-mile stretch of land located in the Six Rivers National Forest that, *while owned by the federal government*, traditionally had been used by the Indians for religious purposes. The Forest Service commissioned a study of the American Indian cultural and religious sites in the Chimney Rock area of Six Rivers which found that the region was integral to Indian religious ritual, and that "privacy, silence, and an undisturbed natural setting" were necessary to the practice of their religion. *Id.* at 1322. The report accordingly recommended that the roadway not be completed. The Forest Service decided, however, not to adopt this recommendation and proceeded to select a route through the Chimney Rock area as far removed as possible from the archeological and other sites used by the Indians for spiritual activities. Alternate routes specifically were considered and rejected "because they would have required the acquisition of *private land*, had serious soil stability problems, and would in any event have traversed areas having ritualistic value to American Indians." *Id.* (emphasis added).

The Supreme Court in *Lyng* held that notwithstanding the undisputed severe adverse effects completion of the

proposed roadway would have on the practice of the Indians' religion, "[w]hatever rights the Indians may have to the use of the [Chimney Rock] area . . ., those rights do not divest the Government of its right to use what is, after all, *its* land." *Id.* at 1327 (emphasis in original) (citation omitted). While recognizing that "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment," the Court noted that "[t]his does not and cannot imply that *incidental* effects of government programs, which may make it more difficult to practice certain religions but which have no *tendency* to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." *Id.* at 1326 (emphasis added).

Appellees seize upon the first amendment principles considered in *Lyng* in support of their contention that the free exercise clause does not prohibit governmental action that would substantially interfere with the practice of religion so long as the government's conduct is not actually coercive or penal in nature. We disagree. The *Lyng* Court declined to determine the "exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs." *Id.* The Supreme Court merely held that "whatever" the effect completion of the roadway might have on traditional Indian religious practices, the government could not be denied use of its own land. *Id.* at 1327 (citing with approval *Bowen v. Roy*, 476 U.S. 693, 724-27 (1986) (O'Connor, *J.*, concurring in part, dissenting in part) (distinguishing between government's use of Social Security number in its possession to aid administration of welfare programs and the government's *requiring* individual to

provide such information)). Besides, as Judge Lumbard has recognized, the government's use of its property involves significantly different considerations than the taking by the government of privately-owned religious property. *See Wilson v. Block*, 708 F.2d 735, 742 n.3 (D.C. Cir.) (Lumbard, *J.*, sitting by designation) (distinguishing *Pillar of Fire*), *cert. denied*, 469 U.S. 956 (1983). Incidental burdens on the practice of religion will not suffice to require the state to come forward with a compelling reason justifying its actions. When, as is claimed in this case, however, a proposed governmental action would substantially effect the practice of religion, there exists at least a material issue of fact concerning whether the state has interfered with the free exercise of religion. *Cf. Lyng*, 108 S. Ct. at 1326; *see Wisconsin v. Yoder*, 406 U.S. at 218; *see also Johnson v. Katz*, 68 N.Y.2d 649, 505 N.Y.S.2d 64, 65 (1986) (lack of "material issue of fact" warrants dismissal of Article 78 petition without a hearing); CPLR § 7804(h) (requiring hearing on any "triable issue of fact").

The Seminary's initial willingness to sell the two-acre parcel in January 1988 does not alter our determination that the proposed taking of the Seminary's property raises a significant question under the first amendment. As the district court itself stated, "if [the] taking [of] these two acres [constitutes] an interference with [the] free exercise of a religion[,] that is the case regardless of what the attitude of the church is to the overall [housing] plan." There is in our judgment an enormous difference between the Archdiocese agreeing to sell its property and the government proceeding to condemn it. We certainly do not take lightly the Seminary's claim of interference with a first amendment right. In any event, the district court assumed for purposes of its decision the validity of the Seminary's

claim of religious interference. To have held otherwise, the district court would have had to hold a plenary hearing on the issue. Indeed, since the record before us does not reflect a considered judgment on the religious interference question, we do not preclude the district court on remand from addressing this issue. Nevertheless, we too accept as true for purposes of this appeal the Archdiocese's allegations that the taking of the Seminary site would "substantially affect [the] work at St. Joseph's" and that the site is "essential" to the Seminary's mission. *Cf. Pillar of Fire*, 509 P.2d at 1253-54.

Turning to the question of whether the condemnation of the Seminary's property is essential to achieve a compelling state interest, it is well settled that a limitation by the government on the free exercise of religion is permitted only when the state can demonstrate that a compelling interest justifies the restriction and that no alternate means of accomplishing the state's compelling interest are available. *See Brandon v. Board of Educ.*, 635 F.2d 971, 976 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); *see also Sherbert v. Verner*, 374 U.S. at 406; *Pillar of Fire*, 509 F.2d at 1253. Consistent with the district court's disposition below, appellees assert that the inclusion of the Seminary property in the Consent Decree is essential to the implementation of the Housing Remedy Order.

We do not agree that this is necessarily so. Although the district court considered the universe of reasonable alternate sites to be limited to those "capable of being utilized in a federal decree [with] a reasonable timetable for implementation," the court also clearly recognized the availability of such sites since it was willing to permit the City to designate a substitute for the Seminary property. Thus, the City's steadfast refusal to propose a modification of

the Consent Decree to delete the Seminary site does not provide a sufficient basis to justify interference with petitioner's first amendment rights. While the City now takes the position that the "framework for remedying the constitutional violation found by the district court cannot be modified simply by substituting sites [because t]here are no politically acceptable alternatives," City of Yonkers Brief at 35, the fact remains that political expediency is far from a compelling reason to force the Seminary to give up its property in derogation of a constitutional right.

Consequently, assuming as we do for purposes of this appeal that the taking otherwise impermissibly burdens the Seminary's free exercise rights, the Seminary is entitled to be heard on the issue whether the taking is necessary to vindicate a compelling state interest. At such a plenary hearing with expert testimony from both sides and in which the competing interests of church and state are fully addressed and the availability of reasonable alternate sites seriously considered, the district court will be able to determine whether the public interest in remedying discrimination can be reasonably accomplished without the taking of the Seminary's property. The point is that on the basis of the existing record before us, we are not in a position to make an intelligent judgment in this matter one way or the other. The protections afforded by the first amendment require at the very least that the Seminary have a full and fair opportunity to have its rights considered in an attempt—consistent with the "great respect" courts accord religious groups—to avoid a direct confrontation between church and state. *See Pillar of Fire*, 509 P.2d at 1254. If accommodation between the competing interests of church and state is possible, then it ought to be pursued no matter how compelling the state interest might be. *See Lyng*, 108 S. Ct. at 1327-28 ("[n]othing in our

opinion should be read to encourage governmental insensitivity to the religious needs of any citizen[; t]he Government's rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices") (citation omitted); *Wisconsin v. Yoder*, 406 U.S. at 215; *Sherbert v. Verner*, 374 U.S. at 406-07.

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One final word is in order. The patience exhibited by the district court under enormously trying circumstances is commendable. Judge Sand has always kept sight of the decisive objective in this case: "[t]hat is, to build the [200 units of] housing as quickly as possible in a manner . . . which will enable future generations in Yonkers to look back and say this was the best possible housing in the best possible locations [that could be built] under the circumstances which obtained in 1988." We trust that the district court will find some way to facilitate reconciliation among everyone concerned in this case so that implementation of the first leg of the Housing Remedy Order can begin as quickly, and hopefully as smoothly, as possible.

CONCLUSION

We affirm the district court's order denying petitioners' motions to remand for lack of federal removal jurisdiction under the authority of the All Writs Act. We also affirm the court's order dismissing the Article 78 petitions in every respect except with regard to the Seminary's first amendment challenge to the taking of its property which is remanded to the district court for further consideration consistent with the views expressed in this opinion. The mandate shall issue in 7 days, and it is so ordered.

Affirmed in part, vacated and remanded in part.

MAHONEY, *Circuit Judge*, dissenting:

I respectfully dissent. In my view, the Article 78 proceedings were improperly removed and should be remanded to state court. Accordingly, I would not reach the merits.

The facts respecting the removal are straightforward. The City commenced condemnation proceedings against the Raceway and the Seminary, as required by the Consent Decree, on April 21, 1988. The Raceway and the Seminary filed answers and, on May 18, 1988, filed Article 78 petitions as well, presumably for protective reasons.[1]

On the morning of May 27, 1988, before any significant action had been taken in state court with respect either to the condemnation or Article 78 proceedings, the district court signed an order to show cause bringing on, later that morning, a motion by the United States in the federal litigation to compel the City to petition for removal of the Article 78 proceedings to the federal district court. The motion was granted, and the City so ordered, later that day. Accordingly, the City filed a petition for removal on

1 *Compare Piotrowsky v. Town of Glenville*, 101 A.D.2d 654, 475 N.Y.S.2d 511 (3d Dep't 1984) (defenses to a taking of property by condemnation properly raised by initiation of separate Article 78 proceeding), *with Town of Cocksackie v. Dernier*, 105 A.D.2d 966, 482 N.Y.S.2d 106 (3d Dep't 1984) (such defenses may be raised by answer in condemnation proceeding). The Raceway and the Seminary posed the same defenses both by answer in the condemnation proceedings and in their separate Article 78 proceedings; the latter also sought to enjoin the condemnation proceedings.

section 1441, "defendants," presumably a distinction without a difference), and the Supreme Court has twice held that whatever labels state law may apply, a condemnee is a defendant for purposes of federal removal statutes. *See Chicago, Rock Island & Pac. R.R. v. Stude*, 346 U.S. 574, 580 (1954); *Mason City & Fort Dodge R.R. v. Boynton*, 204 U.S. 570, 579-80 (1907). In both those cases, as here, a complaining landowner was required by state law to initiate an action to raise objections to condemnation, in which action the landowner was denominated the "plaintiff" by state law. Both cases held the landowner/condemnee was the defendant for federal removal purposes, regardless of state law, and therefore the only party that could remove the case to federal court.

In all candor, given the clear language of the pertinent statutes and the equally clear holdings of two Supreme Court decisions, I do not regard this question as difficult, or even close. Removal is manifestly not warranted by 28 U.S.C. § 1441 (1982 and Supp. IV 1986) or 28 U.S.C. § 1443 (1982). This brings us to the All Writs Act, 28 U.S.C. § 1651(a) (1982). *Cf.* 28 U.S.C. § 2283 (1982) (federal court stay of state court proceedings).

Echoing the rationale expressed by the district court, the majority concludes that "because of the significant risk of inconsistent decrees from two courts, it was 'necessary or appropriate' [within the meaning of 28 U.S.C. § 1651(a) (1982)] for the district court to invoke the residual jurisdictional authority of the All Writs Act." The majority notes also that, in light of the history of the underlying federal litigation, the City is likely to be a reluctant and ineffective party to the state condemnation proceedings, whatever assurances it may give to the federal district court in that regard.

In reaching this conclusion, the majority cites and discusses the leading Supreme Court case on this issue, *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34 (1985), but never sets forth the basic rule articulated in that case for a situation where, as in the case of removal, other federal statutes address the issue or situation before the court. That rule is:

> The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although the Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.

Id. at ____, 106 S. Ct. at 361.

Pennsylvania Bureau of Correction held that the pertinent habeas corpus statute, which stated that the writ should be directed "to the person in whose custody the party is detained," did not authorize direction of the writ to a noncustodian; and that the All Writs Act should not be invoked for that purpose in view of the statute specifically addressed to the situation and making a different provision. *Id.* at ____, 106 S. Ct. at 360-61. The court, added, however:

> There may be exceptional circumstances in which a district court can show clearly the inadequacy of traditional habeas corpus writs, such as where there are serious security risks. In such circumstances, a district court may find it "necessary or appropriate" for Marshals to transport state prisoners. We therefore

leave open the question of the availability of the All Writs Act to authorize such an order where exceptional circumstances require it.

Id. at ____, 106 S. Ct. at 361.

When the issue which this court must decide is properly framed in terms of the controlling authority of *Pennsylvania Bureau of Correction*, it is apparent that the removal undertaken below and approved by the majority here was not warranted by the All Writs Act. Whatever the difficulties in the underlying federal civil rights litigation, to which of course the Raceway and the Seminary are not parties, I see no warrant for a preemptive strike upon a state court which had not even begun to consider the eminent domain proceedings pending before it.

Both the district court below and the majority here acknowledge the "ability, objectivity, [and] integrity of the state court." The officers of that state court are, it might be added, sworn to support the Constitution of the United States. U.S. Const. Art. VI, cl. 3. Accordingly, the state court was entitled to a presumption at the outset of the condemnation proceeding that it would proceed with sensitivity to and awareness of the legal and social context in which the condemnations are occurring.[3] In sum, there was no basis to disregard the "principles of equity, comity and federalism," *see Mitchum v. Foster*, 407 U.S. 225, 243 (1972); *see also Kerr-McGee Chemical Corp. v. Harti-*

3 It was similarly premature to allow removal on the assumption that the City would be a reluctant condemnor when, whatever weight is accorded to that hypothesis, the United States and/or the N.A.A.C.P. could seek to intervene in the state court proceedings, and it appears likely that such an application would be granted. *See* N.Y. Civ. Prac. L. & R. 1013 (1976); *Bay State Heating & Air Conditioning Co. v. Am. Ins. Co.*, 78 A.D.2d 147, 434 N.Y.S.2d 66 (4th Dep't. 1980).

gan, 816 F.2d 1177, 1181-82 (7th Cir. 1987), which should govern our consideration of this issue.

The authorities cited by the majority in support of removal are easily distinguishable. *United States Alkali Export Ass'n, Inc. v. United States*, 325 U.S. 196 (1945), construed the All Writs Act to authorize an appeal of a district court determination that it had jurisdiction over a dispute whose resolution, in the Supreme Court's view, Congress had entrusted exclusively to the Federal Trade Commission. There is no question here that the state court is an appropriate forum to deal with eminent domain proceedings under state law.

The All Writs Act was invoked in *Benjamin v. Malcolm*, 803 F.2d 46 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1358 (1987), to allow the addition of state defendants in a lawsuit challenging overcrowding in New York City jails where the state was dilatory in accepting transfer of prisoners, thus precluding correction of constitutional violations, and relief could not practically be achieved without the decreed joinder. *United States v. New York Telephone Co.*, 434 U.S. 159 (1977), is similar. Again, there is no question here of adding parties in order to achieve an effective remedy. *In re Baldwin-United Corp.*, 770 F.2d 328 (2d Cir. 1985), found authority in the All Writs Act to enjoin non-parties from commencing state court actions which would undermine the impending settlement of a multidistrict federal class action, a situation totally afield from the present litigation.

Swann v. Charlotte-Mecklenburg Bd. of Educ., 501 F.2d 383 (4th Cir. 1974), found warrant in an express exception to the Anti-injunction Act, 22 U.S.C. § 2283

(1982),[4] to prohibit defendants in a federal school desegregation suit from pursuing a state court action invoking a state statute expressly designed to frustrate school desegregation, noting the possibility of "conflicting orders from state and federal courts." *Id.* at 384.

Perhaps my colleagues' invocation of the *Swann* decision best highlights my disagreement with the majority's ruling. The defendants who were enjoined in *Swann* were principals in protracted federal school desegregation litigation who initiated state court proceedings likely to result in orders pursuant to state law which would contradict and undermine the desegregation orders of the federal court. Here, on the contrary, the Raceway and Seminary are not parties to the underlying federal civil rights litigation, and invoke only the normal rights under New York and federal law of owners of property designated for condemnation by a public authority. It would, of course, be ludicrous to enjoin the Raceway and the Seminary from participating further in the state condemnation proceedings. Since only such an injunction would put this case on all fours with *Swann*, it is clear that *Swann* provides no authority for the course followed here.

There was no analogue in *Swann*, moreover, to the action of the district court here in removing the Article 78 proceedings from state court, purporting to determine all the substantive issues in that proceeding the same day the removal occurred, and then directing the parties to present a proposed order to the state court, before which the related condemnation proceedings remained pending,

4 22 U.S.C. § 2283 (1982) provides:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

reciting that all the substantive issues in the condemnation proceedings had been decided and the state court should accordingly proceed "to determine the sole remaining issue of valuation."

I am afraid that the fevered and highly publicized situation in Yonkers has led both the district court and my colleagues to a novel and unwarranted application of the All Writs Act which is abusive both of the condemnees and, more importantly, of the most elementary principles of the comity that should exist between federal and state courts. I would not, of course, following *Pennsylvania Bureau of Correction*, rule out the use of the extraordinary residual authority provided by that statute if future circumstances warrant its invocation. In my view, however, its application in the circumstances presented by this record was manifestly premature and improper. I therefore respectfully dissent.

EXHIBIT L—First Remedial Consent Decree in Equity, Dated January 28, 1988.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

and

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Plaintiff-Intervenor,

against

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

80 Civ 6761 (LBS)

FIRST REMEDIAL CONSENT DECREE IN EQUITY

The following sets forth certain agreements of the parties to this litigation, and certain actions which the City of Yonkers (the "City") will take in connection with a consensual implementation of Parts IV and VI of this Court's Housing Remedy Order (the "HRO") entered on May 26, 1986. Accordingly, the parties agree as follows:

Public Housing

SECTION 1. The City acknowledges its continuing commitment to the construction of the 200 units of public housing made available by the United States Department of Housing and Urban Development ("HUD") pursuant to the consent decree of March 19, 1984 between HUD and plaintiff-intervenor.

SECTION 2. The City agrees to provide the sites referred to below in this Section under the caption "Sites" for the location of a total of 200 units of public housing referred to in Section 1. The number of such units to be located on each site is not to exceed the number set forth under the caption "Maximum Density" opposite each site.

Sites	*Maximum Density*
Whitman School (north-west field)	40
Lincoln School (lower field)	48*
School 4	24
Helena Avenue	22
Wrexham Road	30
Clark Street	20
Valentine Street	16

SECTION 3. (a) The City shall have the right to submit no later than ten days after the date of this decree a maximum of two additional sites acceptable to HUD to be used for the location of a portion of the 200 units of Public Housing referred to in Section 1.

(b) If the City avails itself of the right to submit additional sites as set forth in paragraph (a), the City shall also submit to the Court a proposed amendment to Section 2 hereof, setting

*If HUD does not approve this proposed density for the Lincoln School site, the densities at other approved sites will be appropriately adjusted.

forth an expanded list of sites and their respective "Maximum Densities", provided that the Maximum Density of no site shall be fewer than 12 units.

(c) Upon approval by the Court, the proposed amendment to Section 2 shall have the same effect as if fully set forth herein at this time.

(d) The City acknowledges and understands that, if no additional sites are proposed by it and approved by the Court, the 200 units of public housing shall be located on the sites and in the densities currently set forth in Section 2.

SECTION 4. On or before the later of fifteen days from (i) the date of this decree or (ii) the date of any approval by the Court of an amended Section 2 (as contemplated by Section 3(c) hereof), the City shall make (or shall cause to be made) fair market value offers to purchase from their respective owners such private sites as are set forth in Section 2 (as theretofore amended). Such offers shall also advise the respective owners that, in the absence of a voluntary agreement for the purchase by (or on behalf of) the City, the City will commence (or will cause to be commenced) legal proceedings to secure control over the relevant site in the most expeditious manner, including the use of the power of eminent domain.

SECTION 5. On or before 60 days of the date of this decree, the City will have (i) concluded negotiations with, and will have acquired title from, owners of private sites willing to sell their respective properties to the City on mutually agreed upon terms or (ii) commenced eminent domain proceedings against owners of private sites who have been theretofore unwilling voluntarily to sell their respective properties.

SECTION 6. On or before 80 days from the date of this decree, the City shall have caused the Municipal Housing Authority ("MHA") to prepare a request for proposals ("RFP") from developers for the construction of 200 units of Public Housing to be located as provided in Section 2. The parties

agree that they will cooperate in good faith with each other, the MHA and HUD to insure that the preliminary steps in the preparation of a final RFP (including (i) the preparation of preliminary site reports for all sites (which shall be prepared at the City's expense subject to reimbursement from HUD, if HUD approves the development proposal), (ii) the subsequent review of such site reports by HUD, (iii) any conferences required to agree on appropriate language for the RFP, and (iv) the drafting of the final RFP) can be completed within the time limitation set forth in this Section.

SECTION 7. (a) On or before the later of (i) 10 days after having acquired site control over all the sites referred to in Section 2 or (ii) the time limitation set forth in Section 6, the City shall cause the MHA to publish at the City's expense the RFP referred to in Section 6 in a manner reasonably calculated to insure that the RFP is broadly disseminated to developers doing business in the Yonkers area. The methods of publication shall include (without limitation) advertisements in The *New York Times* and another newspaper of general circulation in the Yonkers area, direct mailings to specific developers, and periodic advertisements in no fewer than two trade magazines identified by the OHA, and shall otherwise conform to HUD Handbook 7417.1 REV-1 (October 1980) ¶ 6-39(b).

(b) The publication referred to in paragraph (a) shall be made at least once each week for two consecutive weeks.

SECTION 8. The review of developers' proposals shall begin 55 days after the date on which the RFP is first published. The MHA shall complete such review within 20 days and submit its selection to HUD immediately thereafter for HUD's review according to HUD's procedures. Construction shall begin as promptly as practicable following HUD's approval of the development proposal.*

*The parties acknowledge that HUD's processing time for such approval is 30 days. The parties understand that HUD will expedite the approval process if possible.

SECTION 9. The City will fully and in good faith cooperate with all persons, parties, and organizations the involvement of which is necessary or desirable for the completion of the process contemplated hereinabove.

SECTION 10. The City agrees that, to the extent it relates to the City's obligation to provide sites for the placement of 200 units of public housing, it will seek no further appellate review of the decision of this Court entitled *United States of America et al. v. Yonkers Board of Education et al.*, 624 F.Supp. 1276 (S.D.N.Y. 1985) or of any subsequently entered decree. The City acknowledges that if any subsequent appellate ruling (whether such ruling had been prosecuted by the City or any other party to this litigation) were to nullify or in any way weaken the constitutional or statutory basis of the City's obligation to provide such sites (as found by the Court in the opinion above), the City would, nevertheless, be required by this Decree on Consent fully to discharge such obligations as set forth herein.

Section 11. The parties acknowledge that HUD has not heretofore given its final approval for the sites and densities set forth in Section 2 or for any final development plans for such sites and that, in accordance with the Consent Decree dated March 19, 1984, HUD may disapprove specific proposals that fail to meet applicable standards for approval.

Assisted Housing

Section 12. The City acknowledges that a long-term goal (the "Goal") of 800 units of assisted housing (the "Units") is an appropriate target in fulfilling its obligations pursuant to Part VI of the HRO. The City will, subject to the terms hereof, make good faith efforts to take such steps as are required to achieve said Goal on or before June 30, 1992 and to achieve benchmarks of 200, 400, and 600 Units on or before the first, second, and third anniversaries, respectively, of the adoption of Mandated Incentives (as contemplated in Section 17).

Section 13. (a) There shall be a presumption in favor of allowing two years for the Mandated Incentives to demonstrate their effectiveness in fostering the development of a sufficient number of Units timely to achieve the Goal without the adoption of additional remedial measures.

(b) Notwithstanding paragraph (a), after the first anniversary of the adoption of Mandated Incentives, plaintiff or plaintiff-intervenor may move the Court for an order directing the City to take additional remedial measures if the movant satisfies the burden of overcoming the presumption referred to in paragraph (a) by clear and convincing evidence that the Mandated Incentives are insufficient timely to achieve the Goal.

(c) If, on or after the second anniversary of the adoption of Mandated Incentives (or at such earlier date as provided in paragraph (b)), the 400-Unit benchmark referred to in Section 12 has not been met, the plaintiff or the plaintiff-intervenor may apply to this Court for an order requiring the City to adopt additional or substituted remedial measures to insure that the Goal will be timely met.

(d) The City acknowledges that the additional or substituted remedial measures which the Court may require it to adopt as provided herein may include the requirement that the City issue (or cause to be issued) RFPs for the construction of multifamily housing (to include Units) on city-owned land. The City acknowledges further that it would be within the power and jurisdiction of the Court to require such use of city-owned land.

Section 14. The parties agree that the Units shall be provided only in conjunction with, or as a part of, housing developments containing units to be offered for sale or rental at market rates.

Section 15. The parties agree that, pursuant to Section 12, no fewer than (a) 100 Units shall be provided on terms affordable to families earning no more than 50 percent of the median

income in the New York Metropolitan Area; (b) 300 Units shall be provided on terms affordable to families earning no more than 80 percent of the median income in such Area; (c) 300 Units shall be provided on terms affordable to families earning no more than 100 percent of the median income in such Area; and (d) 100 Units shall be provided on terms affordable to families earning no more than 120 percent of the median income in such Area.

Section 16. This decree shall impose on the City no obligation with respect to city-owned property, except as contemplated by Sections 2 and 13 and previously issued orders of this Court.

Section 17. The City agrees to adopt, among other things, legislation (a) conditioning the construction of all multi-family housing (inclusive of projects for future construction currently in the planning stage but which will require zoning changes, variances, special exceptions, or other discretionary approvals from the City to begin construction) on the inclusion of at least 20 percent assisted units; (b) granting necessary tax abatements to housing developments constructed under the terms of the legislation referred to in clause (a); (c) granting density bonuses to such developers; (d) providing for zoning changes to allow the placement of such developments, provided, however, that such changes are not substantially inconsistent with the character of the area; and (e) other provisions upon which the parties may subsequently agree (including the use of the Industrial Development Authority as a development vehicle and the creation of a municipally-designated, independent not-for-profit Local Development Corporation) (collectively, the "Mandated Incentives"). The City agrees to implement a package of Mandated Incentives as promptly as practicable but, in no event, later than 90 days after the entry of this decree.

Section 18. The parties acknowledge that certain issues remain to be agreed upon. These issues include, without limitation, the appropriate percentage configuration (as between assisted- and market-rate units) of the relevant housing develop-

ments; the appropriate share of Units devoted to rental or to ownership; the appropriate resale limitations for Units allocated to ownership; the implementation of other financial mechanisms to facilitate the provision of Units or to make them more "widely affordable; the appropriate disposition of such funds as are deposited in the AHTF; the steps which the City may take to make the use of "section 8 certificates" more widely available; and the possibility of a reduction in the Units to be made available at prices affordable by the income groups referred to in clauses (b) and (c) of Section 15 if the City were to secure the placement of units of assisted housing in certain housing developments currently under consideration in the City.

(b) The parties agree that they will work diligently to agree on such subsidiary issues and submit to the Court on or before February 15, 1988 a Second Remedial Consent Decree setting forth any understandings with respect to such matters.

Section 19. If in the view of any party there exists a problem or obstacle to the full or timely implementation of this decree, any party may bring such issue before this Court for resolution.

Section 20. Plaintiff-intervenor or the City may assert before this Court such rights it may have to challenge the discretionary decisions which HUD may make in making available the 200 units of public housing which are the subject of this decree, including any decision not to waive the Total Development Cost cap.

Dated: January 28, 1988

Plaintiff,
The United States of America

By: /s/ Brian Heffernan, Esq.

Civil Rights Division
U.S. Department of Justice
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Defendants,
The City of Yonkers and Yonkers
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10/

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Attorneys for Defendants The City of Yonkers and Yonkers Community Development Agency

SO ORDERED:
/s/ Leonard B. Sand, U.S.D.J.

Dated: January 28, 1988

EXHIBIT M—Transcript of Hearing Dated January 19, 1988.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF YONKERS, *et al.*,

Defendants.

80 Civ. 6761 LBS

January 19, 1988
10:00 a.m.

Before:

Hon. Leonard B. Sand, District Judge

Appearances:

Michael H. Sussman
Brian Heffernan
Manuel Vargas
Michael W. Sculnick
Edwin E. McAmis
John H. Dudley, Jr.
Raymond LaRizza
Richard R. Rowley

(2) The Court: By virtue of the random assignment of courtrooms we meet this morning in the courtroom most recently occupied by Judge Edward Weinfeld, who passed away this weekend. One does not lightly enter a courtroom so filled with memories of that great man or sit in the seat he so recently occupied without remembering the marvel he was.

I first had the privilege to come to know Judge Weinfeld some 35 years ago when I served as a law clerk in this building for another distinguished federal jurist, then District Judge Irving R. Kaufman. Even then, 35 years ago, Judge Weinfeld was a well respected and admired judge. In the ensuing years his reputation deservedly grew and was enhanced. Everyone who had the privilege of knowing and working with Judge Weinfeld grew to love him, and, as strong as our love for him was, was his love and respect for this court. No one was more devoted to the work and the traditions of this court than Edward Weinfeld, and he set an inspiring example for us all. He is very much with us this morning.

We will adjourn these proceedings at 11:30 this morning to enable attendance at Judge Weinfeld's funeral. Whether we reconvene at 3:00 this afternoon or some other date will depend on the events of this morning. The court has cleared its docket for the entire week, and we will sit as often and as long as it is productive for us to do so.

In this court's order of December 15, 1987, setting this conference, the court wrote: "The mayor and members of the city council of Yonkers are requested but not directed to attend this conference."

May I ask Mr. Sculnick, are they in attendance?

Mr. Sculnick: Yes, you Honor. I would like to introduce to the court Mayor Wasisko, Nicholas Longo, Mr. Fagan—the remaining four members are caught in traffic. They are on the way. The city manager is also caught in traffic, Neal Deluca.

The Court: Very well. I appreciate their attendance or planned attendance at this session.

Mr. McAmis: Your Honor, would this be an appropriate time for me to introduce myself? I am Edmond McAmis of the Skadden Arps firm and we are here, along with Mr. Sculnick, representing the city. This is our first appearance of the firm in

the case. With me is Professor Charles Haar of Harvard Law School. He is consultant to our firm, our Boston office. Also present are my young colleague Mark Scnabel, and our partner Judge William Mulligan expected to be here this morning but is laid up with a bad back and asks to be excused.

The Court: Certainly. In the court's order of December 15, 1987 I indicated that at this conference: "The (4) court will call upon the representatives of Yonkers to advise what affirmative actions if any Yonkers is taking or planning to take to implement the housing remedy order."

I think that the best way to approach that is at the beginning, although it is not easy, given the long history of conditions in Yonkers, and of these proceedings, to determine exactly where the beginning point is. But I think it is most appropriate that we begin with the Housing Assistance Plan, commonly referred to as HAP.

So my first question to the representatives of the city of Yonkers is whether Yonkers has adopted a Housing Assistance Plan. I remind the parties that in this court's written order of July 1, 1987, the court provided in paragraph 14:

"On or before July 9, 1987"—I am not misspeaking. "On or before July 9, 1987, the city shall adopt and submit to HUD, with copies to the court and the parties, a Housing Assistance Plan, a HAP, for its Year 13 Community Block Development Grant Application. The HAP shall be in good faith compliance with the relevant statutes and regulations and consistent with the city's well defined prior commitments undertaken and the terms of the housing remedy order."

Has the City of Yonkers adopted a Housing Assistance Plan pursuant to that order?

(5) Mr. McAmis: Your Honor, if I may address that question—

The Court: First by answering yes or no and then you may elaborate.

Mr. McAmis: Yes.

The Court: It has adopted a Housing Assistance Plan consistent with that order?

Mr. McAmis: I am advised by Mr. Sculnick that that was for the second year of the three-year program that was set up in the 1986 housing remedy order.

The Court: Has the City of Yonkers, by action of its city council, adopted a Housing Assistance Plan in compliance with the commitment it undertook first in 1980 with respect to 100 units, and then in 1981 with respect to 200 units?

Just so there is no ambiguity, Mr. Kenneally, will you distribute copies of this letter to the parties and to those seated in the jury box.

Is your answer yes, that the city council has done that?

Mr. McAmis: The fact is, your Honor, the city council adopted a second year. What remains outstanding and to be done is the third year of this three-year program.

The Court: Do you have a copy of what it is that the city council did, as provided by that order, that (6) you can furnish to the court and the parties?

Mr. Sculnick: Your Honor, in accordance with the July 1 order, the city council adopted resolution 140 of year 1987, which attached a second-year increment of the HAP. That was adopted on July 7, 1987 in direct response to the July 1 order. As Mr. McAmis is now indicating, the issue that is now present is the third year increment to the HAP which was due, I think, about at the end of October. So it is a new HAP that we are now talking about, not the HAP that was a response to your July 1 order.

The Court: Is there now, at this moment, in effect by adoption by the city council of Yonkers a Housing Assistance Plan in compliance with the commitment undertaken in the document dated July 9, 1981, which has just been distributed and which was entered as an exhibit during the liability hearing, consistent with the court's order?

Mr. Sculnick: Yes, your Honor. There are in effect the 200 units of public housing, if that is your question. There is no HAP in effect in the third year increment of the 1985 through '88 HAP that was entered by this court's order in June of 1986. There is no impediment to the 200 units, your Honor. If that is your question, there has been no HAP that has been adopted by the council, which is the third year of the three-year happen.

(7) The Court: Mr. LaRizza, is HUD satisfied that the city council of Yonkers, as of this moment, has adopted a current effective HAP?

Mr. LaRizza: Your Honor, I am not sure that I can respond to that. If the question is has the city taken the steps necessary to prepare for the 200 units, if that is included in the three-year goal then it would appear that they are in compliance. To ask whether or not they are now qualified for all the other funding, I really can't answer that question. I have had no notice and I haven't had an opportunity to check with HUD to determine that.

(8) The Court: July 1, 1987 was the date of this order, and it was the understanding then of all parties as reflected in this order and the events which preceded this order that the City Council had not adopted such a HAP. I can take judicial notice of the fact that there have been two occasions subsequent to July 1, 1987 when the matter came before the City Council and no affirmative action was taken.

What has transpired since July 1, 1987, Mr. Sussman?

Mr. Sussman: Yes, Judge. As Mr. Sculnick, I believe, indicated, your Honor, the deadline for the adoption of the third-year HAP is October, October 1. The City Council in December at Mr. Oxman's initiative twice considered and twice tabled for apparently lack of votes the third-year HAP which is should have been adopted and and now be in effect. It has not been adopted. It is not in effect.

Without getting into any other issue, I believe there are letters in the files but I didn't bring them here today and I can't make them part of the court's record, that the city has specifically requested a delay or delays in adopting that; and we stand today without it being adopted for at least three months after its timeliness, and I don't really understand the claim that it has been. It (9) hasn't been, and everyone knows it hasn't been.

I am sort of stunned that we are debating a factual matter which I think we have all been dealing with in recent weeks with knowledge that it has not been properly adopted. I don't understand what claims are being advanced to the contrary.

Mr. McAmis: Your Honor could I comment?

The Court: I know it is an easy to resolve because if there is any ambiguity at all, then the City Council can reconvene, and the City Council can very clearly unabmiguously confirm its intent and commitment to construct 200 units of publicly assisted housing in East Yonkers.

You will note in the document that has just been distributed that in July 1981, as a condition to the receipt of federal funds, it was stated in the first sentence on page 3:

"The city is required to take all actions within its control to provide for the construction of 200 newly created units of new or substantially rehabilitated rental housing."

This was the prior year's HAP that dealt with 100 units. Pursuant to that understanding and commitment, during the period 1980 to 1984, the City of Yonkers received $19,760,000 in federal funds, in addition to which, (10) there has been accrued but not yet released to Yonkers because of conditions which bring us to court this morning the sum of $10,184,000.

I am under the impression and belief that there is no HAP in effect in Yonkers. One should resist the temptation to say that Yonkers is in a HAP-less state, but that is my impression and belief, and if that is erroneous, it is a rather simple matter for the City Council to convene itself in a special session as soon as the rules and regulations of the City Council permit, and I understand that, to permit a meeting of City Council, and either adopt, as I believe has not been adopted, adopt the HAP or take other action in compliance with the directive.

Mr. Sussman?

Mr. Sussman: Judge, I just think that the record should be clear, Mr. Sculnick indicated the three-year period '85 to '88, '85-86,'86-87,'87-88. It's the last year, it's our understanding, there is no effective HAP, just so that we understand what we are talking about. There is a HAP under the conditions that you earlier alluded to, the order of the court—

The Court: There has been a HAP passed every year until this year.

Mr. Sussman: No, two of them were deemed passed by action of the court because the city did not comply, but (11) we are not talking about that history. I am not. I am trying to focus on the '87-88 year, which is the current federal fiscal

year. There is no HAP, to my knowledge, for that year. That is the third segment that's being discussed.

If there is some contrary knowledge, I certainly have never seen a resolution for that fiscal year, and I think that is what the court is addressing.

The Court: I am addressing it. Let me indicate why I am addressing it—I will hear you in due course—and I addressed it in the July order:

There are two techniques by which the court can proceed. It can proceed by deeming things to have been done which it was the obligation in the first instance of Yonkers to do, or it can order Yonkers to do those things.

There are limits and disadvantages to the practice of deeming things to have been done. One cannot deem housing to have been built. The building of housing is a complex matter which requires a multitude of proceedings and actions.

The court views the adoption of a HAP, understanding that the obligation to have a current HAP and to build the 200 units of housing goes back to 1980 and 1981, independently of this lawsuit, and understanding that $30 million is involved in that, as having some serious but (12) symbolic value. The City of Yonkers and its elected representatives and all others who speak for Yonkers simply have to come to grips with the fact that there is a commitment on the part of Yonkers to build 200 units of housing in East Yonkers; that a federal court has ordered them to do so, that stay applications were denied by this court, the Court of Appeals, and the full Supreme Court of the United States; that subsequent to that time the Court of Appeals has spoken in an opinion which I believe all students of this court will believe is a unique opinion.

Let me read just one paragraph from that opinion. After summarizing the examples of segregative action and intent, the Court of Appeals wrote:

"Neither this summary nor our more detailed summary in an earlier part of this opinion recounts all of the evidence that supports the district court's finding that the city's housing decisions were intentionally segregative. Given even that fraction of the proof recited here as to the impact of the city's decisions, the sequence of events, the procedural deviations, the conven-

ient disregard of substantive standards, and the explicit and veiled statements of racial concern, we regard as frivolous the city's contention that the evidence is insufficient to support the district court's finding that the city made its subsidized housing decisions with a segregative purpose."

(13) For months this court has heard two excuses advanced for inaction on the part of the city. The first was the unique circumstance of a City Council which was going to be contracted in size with the consequence that City Council persons were running against each other. That event is now past.

The second circumstance was that the case was on appeal. That circumstance is now past.

The court directs that no later than this Thursday, January 21, 1988, the City Council of Yonkers adopt a HAP for the year in question which, in the terms of the order of the court of July 1, 1987, shall be in good faith compliance with the relevant statutes and regulations and consistent with the city's well-defined prior commitments, undertakings, and the terms of the housing remedy order.

The time has come—let me speak colloquially—the time has come for an end to the game-playing. Everyone in this courtroom knows what is meant by the adoption of that HAP, and what its terms and provisions should be; but let me say further, to regard the HAP and the passage of a HAP as being a statement by all who speak for Yonkers, that there is an acceptance of the obligation to comply with the orders of a federal court; and that with that goes a good-faith cooperation and participation in the (14) process of implementing the housing remedy order.

If there is no intent to do that, then don't pass the HAP and suffer the consequences, and I will make those consequences very clear. But let's not engage in hypocritical game-playing. There is a moment of truth for Yonkers. Yonkers will comply with the housing remedy order or it will be in contempt, it will be in bankruptcy; the Emergency Financial Control Board, a representative of which I understand is present this morning, will take those actions which are appropriate and necessary for that body to take; appropriate notice will be given to the governor of the State of New York to take such actions as are appro-

priate when a city is in contempt and on the verge of bankruptcy.

The issues transcend Yonkers. They go to the very foundation of the system of constitutional government. If Yonkers can defy the orders of a federal court in any case, but especially a civil rights case, because compliance is unpopular, and if that situation is tolerated, then our constitutional system of government fails. The issues before this court this morning are no less significant than that.

Pursuant to the court's order of July 1, 1987, as amended by this oral direction, unless the City Council adopts that HAP, the substance of which we have already (15) discussed, by 4:30 on Thursday, it will be in contempt of court.

Please put your hand down, sir. I will call on you when it is appropriate.

Unless such a HAP is adopted by 4:30 on Thursday, the fines set forth in Paragraph 16 of the court's order of July 1, 1987 will be due and payable, which means that commencing this Thursday, Yonkers will be in contempt and shall be fined at a daily rate pursuant to the following formula:

(a) $100 for the first day of noncompliance after entry of a finding contempt and notice.

That is taking place now.

The daily rate shall be doubled for each consecutive day of noncompliance. Said fine shall be payable by a check drawn to the Clerk, Southern District of New York, and the City Manager shall cause said check to be delivered to the Clerk of the court by 4:30 p.m. on each day that the Clerk's office is open, representing the amount of the fine incurred for the previous day. The check to be delivered on a Monday shall include any fines incurred with respect to days on which the Clerk's office was not open.

The proceeds of said check—please listen and understand this carefully—the proceeds of said check (16) shall be paid into the Treasury of the United States for general purposes, and shall not be earmarked, escrowed, or otherwise allocated

for any special purpose or fund. The amount of funds previously paid shall not be refundable.

Understand that once those fines are paid, unless an appellate court sets them aside, there is no way short of an act of Congress that the City of Yonkers will recover those moneys.

I am sure many in Yonkers have done their arithmetic, and I am sure the Emergency Financial Control Board has done the arithmetic and knows the precise point at which Yonkers will be bankrupt.

The court directs, as it did in July but I understand the direction is not really necessary because there is a representative of the Emergency Financial Control Board present, that that body be apprised of this court's order, and of the potential for Yonkers being bankrupt in a matter of weeks.

I say again to Yonkers, here is the issue in a clear and simple form. It does not deal with any details or niceties with respect to particular sites. It deals with the overall commitment to comply with the orders of the court, and if the Yonkers City Council is not prepared to do that, don't pass the HAP and you will by the process which I have indicated discover that the construction of (17) the housing will go forward but it will go forward under the most expensive, the most divisive, conditions possible.

Mr. Sculnick, is the order and direction of the court understood?

Mr. McAmis: Quite clear, your Honor.

The Court: Yes. Thank you.

Mr. McAmis: May I address the court?

The Court: Yes. I just want to make sure, is there anyone to whom that order is addressed, any representative of the City Council or the City Manager or anyone else, who has any doubts or fails to understand what it is that the court has directed in open court and in their presence?

Sir, You wish to be heard?

Mr. McAmis: Your Honor, if it may please the court, this is a matter, this HAP is one of several matters that I have had discussions about in the last couple of days with Mr. Sussman and Mr. Heffernan. I believe that we have a solution. It has been discussed, however, in the context of a wider-ranging dis-

cussion in which we have endeavored to determine whether there is any way in which this housing remedy order can be complied with.

The Court: I am aware, if I may interrupt you, I am aware that there have been some such discussions, and indeed, I granted with enthusiasm the request that was made (18) for an adjournment of this hearing, which was originally scheduled for January 11, to permit those talks to go forward, and I had hoped that this morning's conference would be a conference in which one addressed the process of healing the wounds, stopping the hemorrhaging of funds which results from this litigation; and I am distressed that that has not taken place.

Certainly I recognize, I think everyone in this courtroom recognizes, that a consensual resolution to this is preferable to the type of confrontational order which has typified these proceedings thus far, and the reason why I focused on the HAP, I have stated, I think it involves a commitment; and unless and until Yonkers is prepared to say, "We recognize that that is our obligation," then the rest becomes just details.

I also recognize one other thing. Let me say it and then I will permit you to make your statement:

This court is acutely aware of the consequences of an order such as the order that I have just entered on the entire community of Yonkers. I received submissions some months ago in which concern was expressed about the bond rating given by Standard & Poor's and Moody's to the City of Yonkers.

If the gentlemen and ladies who are involved in municipal financing pick up their papers tomorrow and learn (19) how close Yonkers is to bankruptcy, the consequences of that, I think, are very clear.

Also, I think everyone in this courtroom is cognizant of the fact that if the economy of Yonkers is depressed, for whatever reason, those who will suffer first and most are the members of the class on whose behalf this action was taken.

We are going to recess at 11:30 this morning. The court is glad to make available to the members of the City Council and to their attorneys and anyone else a caucus room. I recognize that formal meetings of the City Council have to take place on certain notice, and I believe in Yonkers.

If you wish to come back later today and say that you have caucused with the City Council and there is a firm commitment on the part of a majority of the City Council to adopt the HAP and to express to the court and to the parties the intention of the City of Yonkers to comply in good faith with the obligations to implement the housing remedy order, then that cloud that hangs over Yonkers can be lifted, and then we can address what other affirmative actions Yonkers will take or will not take to implement the order.

There are a multitude of specific actions which Yonkers can take, and if you wish to do that, fine. I will (20) welcome that.

Mr. McAmis: Your Honor, it is exactly in an effort to bring this litigation to a conclusion, this painful litigation to a conclusion, and to do it in a way other than a way that is the most expensive and most divisive, that we have had these discussions to which I referred earlier.

The Court: Can you just in broad terms tell me what the status of those discussions is?

Mr. McAmis: In a sentence, we have had discussions during this last week, and I have had other meetings, caucuses with the City Council, and we have discussed a range of issues. We believe that progress has been made.

Do we have a settlement at this point? No, but it is my position on behalf of the city that there has been enough movement and enough progress here that these discussions should be allowed to go on for a brief additional time to see whether we can come to a conclusion.

The Court: Do you represent to the court, based on the advice which you have received from your clients, that those discussions are going forward in good faith, not merely as a dilatory ploy, and with the intent and commitment that as a result of those discussions a consent housing remedy order will be submitted to the court?

(21) Mr. McAmis: I certainly can represent absolutely that these discussions are going on in good faith. That is what I am—

The Court: I make a sharp distinction—I am sure you are aware that I phrased my question carefully—I am not in any sense questioning the good faith of counsel, but there are re-

ports abroad that groups in Yonkers have been assured that this is simply a holding action to gain more time. More time against what? I don't want to usurp the role of counsel for Yonkers, but I think a fair assessment of the consequences of the tone and substance of the Court of Appeals' decision is that compliance with the housing remedy order is an inevitability for Yonkers.

Would you like to recess until 3 o'clock this afternoon?

Mr. McAmis: Well, your Honor, on that point, let me just respond. I think that there is a new spirit. The new young mayor of Yonkers said at his inauguration address publicly, "This mayor obeys the law."

The Court: I welcome that remark.

Mr. McAmis: Also, I have attended numerous City Council meetings since our firm was retained, by which I mean caucuses generally, and I have found the majority on the Council to be cooperative in this effort, and they have indicated that they want this effort to be undertaken.

(22) The Court: Recess. Let's recess. Caucus, come back and tell me that a majority of the members of the City Council have authorized you to state unequivocally that the City of Yonkers is committed to a good-faith implementation of the housing remedy order, that the City of Yonkers in good faith wants to discuss the specifics of the timetable for implementing that. We can do that in a matter of hours.

Mr. McAmis: Your Honor, as in any other negotiation, it doesn't seem to me well thought out to have the specific terms talked about in a public courtroom.

The Court: I am not suggesting that. I am suggesting that there is one thing which is simple and is clear, and that is the HAP and the commitment. And frankly, in all candor, unless and until the City of Yonkers says to the court, "There is a new spirit in Yonkers, a spirit which is not of obfuscation and delay, but of compliance and good-faith commitment," then the input of the City of Yonkers has to be taken in the context of the absence of such a commitment.

Gentlemen, I see your hands. I know you wish to be heard.

Mr. McAmis: Your Honor, the City Council has assured me that they do wish to proceed to try to work something out.

The Court: When do you wish this court to (23) reconvene?

Mr. McAmis: Judge, I think the parties would be willing to talk to the court in chambers if you want to know what these negotiations are about. There are no secrets from the court. But I don't see that it's going to be fruitful to come back to a public courtroom until we have a deal.

The Court: But you see, there is no deal with respect to the HAP. There is no deal with respect to the 200 units. I will not agree to any compromise or settlement which in any way dilutes the obligation of the City of Yonkers to build those 200 units of housing. I am certainly prepared to consider and to discuss with the parties any consentual resolution with respect to the long-term housing plan; but the parties shouldn't deceive themselves. The commitment for that 200 units is a longstanding commitment, as evidenced by the document distributed this morning, for which Yonkers received all those sums of money.

Apropos of which I have a further order and direction:

The court hereby orders and directs that the $19,760,000 heretofore received by the City of Yonkers in federal funds pursuant to the agreements and commitments with HUD shall be deemed to be held in trust by the City of (24) Yonkers for the purposes of implementing its commitment with respect to the housing remedy order.

Mr. Heffernan, would you on behalf of the court, do the preliminary work necessary for the opening of an escrow account to hold so much or all, if necessary, of the $19,760,000 in federal funds which the court has deemed Yonkers to hold in trust. Disbursements from that fund are to be made only pursuant to a written order of this court.

This court reserves the right at any time to require the City of Yonkers to fund that trust, that is, to deposit in that account cash or liquid marketable securities in the amount of $19,760,000, and to authorize the expenditure from that account of such funds if any as shall be necessary to implement the housing remedy order.

One other matter, and that is, unless and until these proceedings are resolved, Yonkers is in a state of crisis. It is tottering on the brink of bankruptcy. It is tottering on the brink of having its elected officials replaced by appointed officials. Given

that posture, I would like to request but if necessary I direct that no elected representatives of the City of Yonkers remove himself from the jurisdiction of this court pending a resolution of this issue.

Is that understood by all?

Mr. McAmis: Perfectly clear, your Honor.

(25) The Court: Yes.

Mr. McAmis: In view of your direction, and in view of the way this proceeding has gone this morning, may we convene as you suggest privately, that is, the City Council, the mayor and I, and may we then report back to you at a convenient hour this afternoon?

The Court: 3 o'clock this afternoon?

Mr. McAmis: Very well.

The Court: We are adjourned until 3 o'clock this afternoon. Court is adjourned until 3 o'clock this afternoon.

(26) Afternoon Session

3:40 p.m.

The Court: Mr. McAmis, during the period of the recess have you had an opportunity to confer with your clients?

Mr. McAmis: Yes, your Honor. At the direction of the court and when the adjournment took place, I have met with the new mayor of Yonkers and with those city councilmen who are in court today, who are a majority of the entire council. I am authorized to represent to the court that, in the first place, a meeting of the council will take place at 5:00 tomorrow afternoon, Wednesday afternoon, that the appropriate calls for that meeting have gone out. I point out, incidentally, that that is as soon as Yonkers could meet under its rules, the Yonkers council.

Those council members who are here today have authorized me to state that they will support at that meeting a resolution that will put in place a currently effective HAP acceptable to HUD which will reaffirm the commitment of Yonkers to accept funds to build the 200 units of public housing that the court has discussed this morning and required.

The Court: Those persons whom you conferred with constitute a majority of the council?

Mr. McAmis: They do, your Honor.

(28) In addition, your Honor, as I have indicated, discussions have been taking place which are looking to, and hopefully will result in, a resolution of the housing side of this case by consensual agreement. By that I mean, we have had discussions with respect to both the siting and density of the 200 units of public housing, and we are also discussing a plan relating to the long-term aspects of the housing remedy order. I believe that these discussions should be continued, and in order to allow them to be continued and concluded I would make an application that the court adjourn this matter and reconvene at 10:00 on Monday for that purpose.

The Court: What is the position of the Department of Justice?

Mr. Heffernan: Your Honor, the Department of Justice is amenable to an adjournment until 10:00 on Monday to explore the possibilities of a settle.

The Court: What is the position of the NAACP?

Mr. Sussman: The NAACP believes that the time will be well spent and that there will be a possibility by Monday of a settlement between the city and the clients we represent.

The Court: Is there any party who objects to the adjournment?

(28) I will adjourn all proceedings in this case until Monday at 10:00 a.m. I am not certain whether we will be in this courtroom or some other courtroom on Monday, but there will be a notice posted.

I want there to be prepared and submitted to the court, on notice to the parties, prior to 10:00 a.m. on Monday an order which in the absence of a consensual agreement will represent, hopefully, the joint views of the Department of Justice, the NAACP and HUD, with respect to the designation of sites, the unit capacities, the unit allocations, the date for the issuance of requests or proposals with respect to those sites, and any other matters necessary to move implementation of the housing remedy order forward, so that the court will be in a position on Monday either to be advised of the existence of a consensual resolution, and at least the substance if not the specific details

of that consensual resolution, or to execute an order which will move this forward.

I grant any adjournments with great reluctance. I think the parties are fully aware of the fact that I will not countenance delay for the sake of delay. But I would certainly think that an adjournment of a week is appropriate if in fact there is a good-faith basis for believing that that interval of time will enable a consensual resolution of this matter.

(29) There are a number of other matters, including various requests for the lifting of stays. Is there any objection to the lifting of the stay, if indeed there was a stay, with respect to the proposed progressive development applications? Anyone object to the lifting of that stay?

Mr. Sussman: Your Honor, is that Dr. Malik's application?

The Court: Yes.

Mr. Sussman: No objection by the NAACP.

A Voice: Preservation Development Corporation, your Honor.

Mr. Heffernan: The United States has no objection, your Honor.

The Court: I am not certain that that development was ever encompassed within the stay, but in any event that stay is lifted.

With respect to all the other applications for the lifting of the stay, those motions are adjourned until Monday at 10:00 a.m.

On a different subject matter, dealing with the school aspects of the case, is there a desire for oral argument with respect to Dr. Pastor's most recent recommendation? Is there a desire for oral argument on that?

Mr. Sussman: None by the NAACP, your Honor. I (30) don't believe it is necessary.

Mr. Dudley: None by the school board, your Honor.

Mr. McAmis: Could I reserve on that until Monday, your Honor? I just need some time to consult the appropriate people.

The Court: Please advise the court of that on Monday and I will either set a date for a hearing or I will take the matter under submission.

Mr. Sussman: For a hearing or oral argument?

The Court: I don't believe an evidentiary hearing. It would simply be oral argument.

Are there any other matters that should appropriately be addressed this afternoon? Anyone else who wishes to be heard?

Mr. Odom, how much time do you wish?

Mr. Odom: Only a couple of minutes, your Honor. As a dissident member or activist in the black community, I am here today with other activists from the black community who live in the city of Yonkers and who your remedy directly affects. We have made various attempts to communicate our desires to the NAACP and our dissatisfaction with the way they have handled this case until this point. We have been unable to communicate with these people because they have held meetings where they (31) took no new business and would not allow us to present our case to them. On other occasions they have had the police department escort us out of the building.

The Court: What is your application to this court?

Mr. Odom: We are asking, your Honor, that you withhold any decision as to housing in the city of Yonkers until we, as the members of the black community, are allowed to have some input into our fate. Your decision in this court affects us and our children. Our children are bussed against their will and we stand a chance of losing our community by simply transferring poor people to the white community from the west side of Yonkers.

The Court: You may submit to me in writing any matters which you believe should be brought to my attention. Please do so by 4:30 on Friday so that I will have had an opportunity to read it prior to the Monday hearing.

Mr. Odom: We have hired an attorney, Conrad Lind, your Honor. Would it be permissible for him to submit this on our behalf?

The Court: Certainly. Understand that I am not conferring standing or intervention. I am simply assuring you and those you represent that if I receive by 4:30 on Friday anything that you wish me to consider, I will have read it and considered it prior to Monday.

(32) Mr. Sussman: Judge, would you direct that a copy of this be submitted to counsel for the last?

Mr. LeBoeuf: He just interrupted like that. How does he—

The Court: Be quiet, please. I am running these proceedings.

Mr. LeBoeuf: I am sorry.

Mr. Sussman: Could I please ask that any such submission be provided to counsel so it can be understood what the complaints are?

The Court: Yes. Anything else?

Mr. Odom: Thank you very much, your Honor. This is the first time we have had justice in this entire lawsuit.

Mr. Dudley: Judge, I have one miscellaneous matter. I know Mr. Sussman has filed a supplemental application for attorneys' fees. On behalf of the board I want to make it clear that we do not oppose that application. We find the application to be reasonable, both as to the hourly rate and as to the hours claimed. The only reason I rise at all is that I am somewhat concerned with the mechanics of payment, both with respect to that submission when an order is entered and with respect to the order that has been entered on Mr. Sussman's original application. The board and its budget do not have a reserve for claims of this kind. In the (33) ordinary course of business we submit claims or judgements such as this to the city, to be paid from the city's budget, and we would anticipate doing that in this instance. I just wanted to make that clear because we are not objecting as such to the reasonableness of the application.

The Court: On the subject of fees, has the City of Yonkers made payment to the outside housing adviser as directed by the court?

Mr. Sculnick: It is my understanding that it has, your Honor, yes.

The Court: Mr. Newman, is it your understanding that they have been paid?

Mr. Newman: No, they have not paid the outstanding amount for June, July, August, September. They have paid the November bill but not the outstanding 35,000.

The Court: Prior to the next session of court I assume that that will have been paid.

Sir, would you state your name and who you represent and how much time you wish.

Mr. LeBoeuf: Just a few minutes, not even a few minutes. My name is Clayton LeBoeuf, sir, and I am in Yonkers 40 some years. I am president of the Afro-American Citizens Association.

The Court: Is that an organization—

Mr. LeBoeuf: Yes, for 12 years, chartered by (34) the State of New York.

The Court: Is that the same organization that Mr. Odom is associated with?

Mr. LeBoeuf: No, sir, it is not. We have heard of a lot of dollars being spent in the names of black people that this case affects, directly affects, and we talked about up until the present time, your Honor, $30 million spent

The Court: What is your application to the court?

Mr. LeBoeuf: My application is that I am asking you, and I picking a gentleman that I do not even know him, to ask you for any disbursement of money in the name of NAACP or anyone else, that we understand where this money is going. I am not speaking in terms of Mr. Newman and the six people that made 60 million. I am saying that you have made a statement that the court approved that these people be paid, because the NAACP has spent a lot of money. We are saying that the national grant says that they are to receive this money—

The Court: Tell me, what is it that you want the court to do?

Mr. LeBoeuf: We want the City of Yonkers not to pay any legal fees until such time as we the people, who the money was spent against their better judgment, to put (35) that money in escrow just like you did the 19 million until you decide who is to get the money.

The Court: That application is denied.

Mr. LeBoeuf: I thought it would be but I wanted it to be on the record. Thank you.

The Court: Let me clarify the matter. I made a fee allowance to the counsel who appeared in this case and the parties who appeared in this case. If there is any internal dispute as to allocation of funds within the NAACP, that is a matter which

can be addressed separately and is not a matter with which this court is concerned.

Mr. LeBoeuf: Thank you, your Honor.

The Court: Anything further?

We are adjourned until 10:00 a.m. on Monday, in a courtroom to be designated.

In

EXHIBIT N—Transcript of Hearing Dated July 26, 1988.

(115) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

YONKERS, *et al.*,

Defendants.

80 Civ. 6761 (LBS)

July 26, 1988
10:15 a.m.

Before:

HON. LEONARD B. SAND
District Judge

— — —

(In open court)

The Court: I'm pleased to report that in several respects there has been significant progress in implementation of the housing remedy orders since the parties were last before me. First with respect to the two hundred units of public housing to be built on the seven sites previously designated there has been an agreement reached with HUD and the parties with respect to the essential terms to be contained in the requests for (116)

proposals to be issued soliciting bids from prospective builders of those units. The exact language of the RFPs is being worked upon, but the substantive provisions of the RFPs have been agreed upon after an extended meeting, and I must say that the court is very pleased with the attitude of all the parties at that meeting. Although on some issues there were differing points of view the sense was that everyone was acting in a constructive fashion.

The second area in which significant progress has been made relates to the selection of the executive director for the office of fair housing implementation, and the court and the parties met yesterday with several applicants for that position. Again there was a consensus that the applicants were all extraordinarily well qualified people. We asked each applicant why there was an interest in this position and the response was uniformly that Yonkers and the housing conditions in Yonkers present a unique challenging opportunity. None of the applicants said things had been so bad they can only get better. One might read that between the lines. In any event the court will announce certainly by the middle of next week the person to serve as the executive director having conducted the interviews and having received the recommendations and comments of all of the parties. The third area in which there has been (117) significant progress relates to the affordable housing ordinance. I have been advised by the parties that after meetings and discussion there has been agreement as to the provisions of that ordinance. We had all hoped that the exact text would be available prior to the commencement of these proceedings. The mechanicals are being prepared in the Abeles Schwartz office and I am advised will arrive sometime between 11:00 and 11:30 this morning. I think the sequence in which we take up matters is significant, and what I would propose that we do is that we now adjourn until 12:30, so that we will all have had an opportunity to review the text of the ordinance, so that counsel can satisfy themselves that it is faithful to the agreements that they reached and that we can then proceed with that matter having been laid to rest. Does anyone have any problem with that sequence of proceedings?

Mr. Sculnick: Your Honor, not with respect to the sequence of the proceedings. Just a brief comment on your prior statement this morning regarding the RFP for the two hundred units. The city would like to take this opportunity to restate its position in favor of the townhouse or semi-detached style which I believe was the intent of the consent decree and our hope that through the RFP process that design eventually comes to pass. We understand the need to proceed with the issuance of the RFP (118) and understand the nature in which it will be issued, but we take this opportunity to express our hope that a townhouse style is used on all of the cites.

The Court: We're adjourned then until 12:30.

(Recess)

The Court: I have marked as Court Exhibit A of this date a document the title of which is this chapter shall be known as the affordable housing ordinance, city of Yonkers. Am I correct that each of the parties has received a copy of this document and reviewed it?

Mr. Heffernan: Yes.

Mr. Sculnick: Yes.

The Court: Are there any objections on the part of any parties to the substance of this document?

Mr. Sussman: There are a number of changes.

The Court: Court Exhibit A is a document I received from Mr. Newman and it is a typed document which has the following changes in it.

On page 3 paragraph C now reads to provide for changes in existing zoning requirements and increases in land use densities.

On page 11 paragraphs 2 and 3, one-eighth has been changed to three-eighths. That is an obvious typographical error.

On page 14 paragraph 4 the last three lines read (119) as heretofore provided in this paragraph shall not toll the rung of the 30-year period referred to in subparagraph 2 hereof. Some mechanical changes.

On page 15, paragraph C third line reads endeavor to give occupancy priority in the following order to.

On page 19 the first full paragraph third line there has been stricken the phrase a certain number or percentage of.

On page 20 paragraph 14(b) line 4 the phrase "is available to" is stricken and "shall" is substituted.

On page 21 the second sentence reads the office of implementations shall forward its recommendations to the Yonkers planning board and city council.

On page 23 paragraph P third line the word "that" is stricken.

Page 24 there is added to subparagraph U the sentence the developers shall simultaneously transmit such written statements and supporting documentation to the Yonkers board of education.

Page 25 the last two sentences are transposed, and the last sentence now reads, after the word request, otherwise the application shall be deemed approved.

Mr. Sculnick: One other change, your Honor. On page 22—this has not been discussed by the parties—subparagraph K I've been advised the proper name for the (120) register—that the proper title is state or national registers of historic places, not historic preservation, so the word preservation should be replaced with places.

The Court: That's right. Historic places instead of preservation.

My question to each of the parties then is there any objection to the substance contained in Court Exhibit A which is the document you've previously been furnished corrected in the manner that I've just indicated?

Mr. Sculnick: Yes, the city reiterates its objections made to the long-term plan order upon which this is based. We've cooperated with the preparation of this order based upon the issuance of the long-term plan order, but our objections to the substance of that order are reiterated here, which have already been ruled upon by the court.

The Court: You object to there being a long-term plan.

Mr. Sculnick: And we object to various specific aspects which I think we argued about on June 8.

The Court: But with respect to those matters which have not been previously ruled upon by the court are there any objections to the substance of Court Exhibit A?

Mr. Sculnick: No, there are not, your Honor.

The Court: And are there any objections on (121) anyone's part?

Mr. Sussman: Yes, your Honor, the NAACP objects to the documents as drafted because we feel as we've argued in papers submitted to the court that this structure should not be used, but that's a separate issue.

The Court: But I'm dealing now in terms of planning, zoning and the substantive provisions.

Mr. Sussman: No, no other objections.

Mr. Heffernan: We have no objections.

The Court: All right. That brings us to the questions of the manner of implementation. And the court has before it two proposals. There is the proposal contained in the proposed order of the Department of Justice which one might refer to as the classic contempt—the order, the notice, the opportunity to be heard and then the inposition of contempt sanctions. There is also the proposed order submitted on behalf of the NAACP which takes the route of the affordable housing commission. That is the route which says in essence Yonkers, the Yonkers city council, you have abdicated. You are irrelevant. We will proceed to implement the housing remedy order by an entity other than the Yonkers city council.

My question which I direct in the first instance to the Department of Justice and the NAACP is why should we not do both? We now have a specific document, Court Exhibit (122) A with respect to which there are no substantive objections raised by the city of Yonkers not previously ruled upon by the court. There's a very specific step which the city council of Yonkers could be directed to take—that is, to adopt this ordinance. If Yonkers' city council should fail to adopt this ordinance then as proposed in the Department of Justice order there would be what I have referred to as the classic contempt remedies including fines, personal fines directed to those responsible for the acts of contempt including possible imprisonment for civil contempt. Why should there not be in addition to or as a supplement to those classic remedies for contempt the additional potential consequence of contempt—the creation of the commission which replaces the city council. In other words, the mes-

sage to the city council would be this you must do. This you must do by a specific date. If you fail to do this by the specific day there may be visited upon you all of the sanctions set forth in the Department of Justice proposed contempt order. In addition to that the court and the parties are not going to sit by while the contempt scenario is being played out in every form it may take, but there will also be visited upon Yonkers' city council what is perhaps the ultimate sanction and that is the removal from the city council insofar as implementation of the housing remedy order is concerned, its responsibility for these (123) matters. Mr. Heffernan, do you have any problem with that?

Mr. Heffernan: Yes, your Honor, I do.

The Court: Tell me what your problem is. It is essentially saying that the court adopts and signs your proposed order but supplements it by notifying the parties that in addition to these sanctions if and when it comes about, in addition to the sanctions contained in your order there is the further available sanction which is what we call the commission route. What problem do you have with that?

Mr. Heffernan: Your Honor, obviously we agree with the first portion of that which would be the imposition of contempt sanctions. I think the problem that arises with the commission down the road is that we don't think we're there yet. We think it's important that the city retain some input into this.

The Court: You think we're not there yet. But if we get to the point, August X, if the city council shall have failed to adopt this, if the fines and other sanctions shall have continued do you preclude the possibility that we might at that stage be at the point you feel we have not yet reached?

Mr. Heffernan: At that stage I would admit the possibility of the court taking further action. Whether the commission route is the appropriate action to take I'm not (124) prepared to say at this point. I think basically, your Honor, to put out there the spectre of a commission at this point is to somehow allow the city to take the ultimate copout, to say if we wait long enough and the court is going to impose this commission,

is going once again to allow us to avoid any accountability for our actions—

The Court: Isn't that really an argument? I'm deliberately not for a number of reasons at this point establishing the roadmark—let me shift the analogy—I am not at this point establishing the triggering event which would make appropriate the appointment of the commission. What I am seeking to establish—I am simply putting the parties on notice for obvious due process reasons that this too is a possible sanction and what I am saying is Mr. City Councilman X, if you feel that it is appropriate for you to cause Yonkers as a city to suffer these fines, if you think it is appropriate for you personally to sustain these fines and these imprisonments, this potential imprisonment, and if this goes on for a period of time we're not just going to permit everything in Yonkers to go down the drain, because there is still one other thing which is available to us and that is simply to say insofar as implementation of the housing remedy order is concerned we proceed without you. I think it would be inappropriate, it would be counterproductive at this point to say but if the contempt (125) continues for X number of days, then it would be appropriate. I suggest to you that if the deadline comes and Yonkers is in contempt—I should say in further contempt, I have already stated my view that Yonkers is at present in contempt—we will certainly be all assembled together.

I'd like to make one other comment about your reference to the emergency financial control board in your order and in your memorandum. I think that that is a very appropriate reference, and indeed I have on previous occasions directed that orders and transcripts of proceedings be furnished to the emergency financial control board. I was frankly disappointed when at an earlier stage of these proceedings the city of Yonkers proposed that it be subject to a $29 million judgment if it succeeded in defeating the obligation to construct 200 units of public housing. And I had thought that that proposal was so fiscally irresponsible that the emergency financial control board would simply not permit it to be made. If there is reason, as your papers suggest, to believe that the EFCB is prepared to act in the face of what otherwise would be fiscal disas-

ter for Yonkers and all of its citizens, then it would be very welcomed and certainly again in terms of the sequence of these events were there to be a contempt—that is, a failure to adopt Court Exhibit A—and were there to (126) be a realistic basis for believing that other state agencies might intervene certainly that would be a very compelling argument against the necessity of contempt, so that really all that I'm proposing, and that's why I expressed some surprise that you had difficulty with it, was the classic contempt route, which is what your order proposes, with the additional element again as an inducement to compliance which is what civil contempt is intended to do. It is intended not to punish but to induce compliance—that, if necessary, there is available the further device of removal of the city council from further responsibility.

The other point with respect to the commission if there ever becomes an alternative is that of necessity. There would have to be some actions taken by the city council such as funding, so that I think the concern about letting the city council off the hook is somewhat diluted by the fact that they would have to fund it, and from time to time when appropriate they could be called upon to ratify the actions taken by the commission. Shall I hear from Mr. Sussman?

Mr. Heffernan: Your Honor, one last comment. It doesn't seem that what you're proposing is very much if at all different from the order we submitted to the court two weeks ago which indicated there would be a contempt fine route to be possibly followed at some point in the future.

(127) The Court: It's different in some respects and I don't quarrel with that. One significant difference in my view is that there's now a very specific discrete act which the city council can be called upon to perform. We did not have two weeks ago and we now have this ordinance.

When the court first raised and raised tentatively the notion of a commission I think I indicated then that I did not regard it as being mutually exclusive from other types of remedies—that it was simply another possible sanction.

I might also say that what the court envisioned is a radically different commission from the one contained in the NAACP's proposed order. The main virtue of the commission in my view

is the assurance given to private builders and developers that proposals that they advance will not be sabotaged or reviewed in a hostile climate. I had not envisioned the creation of an additional level of bureaucracy and whether there will ever come a time when a commission is appropriate I think we may know in a week or so. I might add that this is a matter with respect to which I would also like to have the input of the soon to be appointed executive director of the office of fair housing. But the short answer is I'm not disagreeing with your last comment. Mr. Sussman.

Mr. Sussman: The NAACF, as the court is aware, (128) strongly opposes the options which you have laid out today and I want to spend a few minutes explaining why. This is really very difficult because I'm convinced from seven and a half years that the court certainly wants implementation of the order. There's no doubt in my mind as to that. There's great doubt in my mind as to whether any official of the city of Yonkers does and whether there is wisdom in the proposals that the court has laid out and I have very grave concerns at this time as to the views of my clients and the responsiveness of the remedy process to their needs. If we were talking here about the need to have the city council of Yonkers or some administrator within the city of Yonkers do a single act the virtue of the court's proposition would be much less assailable because a civil contempt route is a time honored route, and the force of civil contempt is almost clearly such in almost every instance particularly where fines are substantial and prison contemplated to yield the desired results, but as in Cleveland, Boston, Alabama, as in so many cases where federal courts have been faced with obstreperous and hostile defendants—in Yonkers that is not the situation. We're not here talking about the doing of a single act, and for the court to rather repeatedly define the situations that we face incrementally as forcing the city to take a single act in my view is frankly totally off base. That is not what we're doing (129) here.

The fact that the city council of Yonkers would pass an ordinance under a threat of contempt or fines or bankruptcy is irrelevant, absolutely irrelevant in my view to what we're about here. It doesn't matter at all. Because of course if we start fin-

reason to believe that if the city council passes this ordinance it will mean in the situation that is being created, which is if you don't you'll be fined, personally, the city, contempt, jail and all the rest—that will have any significance whatsoever for the city of Yonkers in implementing this order. In fact it will simply create a precedent that every time you want to do something we should push them to that wall. That is craziness. It is not intellectually honest at this stage of the lawsuit to move back from the structural change necessary. It sends the black community and the Hispanic community the worst possible message, which is that forever (133) these people can get away with it, and the court will simply not act. I think the court thinks it's acting. I recognize the court feels that it's using judicial authority with patience and I've applauded that on other occasions. But we're not now there. We're not now allowed so much rope for the city in my opinion.

I want to say a few words about the government's position because I think it needs saying. In Yonkers as in every other municipality on the federal level power is what counts. Who wields the power to make decisons? That's what matters. To say that depriving people who have stalled something because they've had the power to stall it, depriving them of that by creating structural change is not to impose strong sanctions is entirely paradoxical. It is, as the court noted, the strongest sanction. The only question from my point of view legally is whether the court has to take the other steps before setting up the commission, and I've cited cases which I believe show it does not nor does it have to find the city in civil contempt though it certainly could. It needn't as Judge Carrity noted take such measures when they will be counterproductive. And that has been my point for a year and a half on the issue of sanctions and jail. We don't need to pay attention to Henry Spallone. His position on these issues—I assume they're based on principle—have (134) been overruled by this court. He can continue his opposition. He can continue to speak against the proposals. I'm sure he will and as an American citizen he has a right to do it. The same is true of Mr. Odom. The fact of the matter is that these people cannot continue to interpose delays. That is beyond the scope of their ability and it ought to be. But

that is precisely what we let them do when we say we're going to have a process and in a week you either pass it or we'll have a hearing. Maybe we'll do something else, but from the history of this case we probably won't, so I think the fact is we have a very critical choice to make.

Obviously I'm pleased that the court is not squelching entirely the view of having a commission, but I feel the spectacle that will be created will be a distraction. It is irrelevant. If it were relevant to telling us that there will be future compliance with the nitty-gritty day to day implementation it would be something, but it's not. To get the implementation you need people who are committed to doing it. And frankly as long as those in Yonkers in administrative positions are controlled budgetarily in terms of their career ladder by the Yonkers city council and they indelibly are, we can't assure that. And I don't believe that the minority communities should see the long-term plan sabotaged. After (135) they pass the resolution, then they have control of it, than they sabotage, then we're back. I don't think we need to see that. We have every indication from their action that they will not perform in good faith. And I respectfully disagree as I said and I urge the court to reconsider.

The Court: Mr. Sculnick.

Mr. Sculnick: Very briefly, your Honor, addressing the specific proposal made this morning for in a sense going down both routes, as to the first route the proposed order submitted by the government in the context of this case, I think the city's position is that imposing fines or the threat of fines and imprisonment would be more punitive than remedial. In some respects some of the arguments made by the NAACP but I think from a different perspective—

The Court: Then you have an obligation. If you say that, then you have an obligation to affirmatively endorse some other proposal. You oppose both the contempt and the commission, and that really does not provide very much guidance to the court.

Mr. Sculnick: I think the city does oppose both. I think that's correct and I appreciate your position. But the reason the city opposes both is that in the first instance the threats of con-

tempt and fines are not remedial and in the second instance the suggestion of the (136) commission—as I stated in our paper the city council is obviously not in a position to consent to such a commission since it would be divesting important legislative functions, and the case law simply does not support in our view the wresting away of legislative functions as opposed to purely administrative functions.

The Court: Mr. Heffernan.

Mr. Heffernan: Your Honor, if you will indulge me for a few minutes I feel compelled to respond to what Michael just said. The government and the NAACP have a basic disagreement here. We have a basic disagreement going towards the same end. The city basically doesn't want contempt sanctions, the commission. They hope the case will go away. It's not going to. We believe, your Honor, it's somewhat naive to think that even with the creation of the commission city council, city officials are somehow going to be removed from the pervasive link of persuasion and influence which to date has stymied the remedial process in this case. Quite the opposite. We believe that failure of this court to move forcefully right now to take action to make sure that its orders are obeyed will only strengthen the opposition, the obstruction, and will basically allow city officials to continue to openly enflame community opposition. It's easy to say that the city council—let them yell and scream, say what they want, you know words (137) aren't going to hurt you. But here, your Honor, the words of language, Henry Spallone or Nick Longo, are more than words. They're rallying cries. They're a call for defiance. And that's why we believe the contempt sanctions here are very, very important to continue the remedial progress in this case.

Mr. Sussman: Your Honor, can I respond to that very briefly?

The Court: Okay.

Mr. Sussman: One is that the post-order of the NAACP provides on page 5 section 6(a) personal sanctions for persons either who do not comply, city agents or employees who do not comply with requests from the executive director and additionally for anyone who interferes with the discharge of the

YAHC's duties, and I don't think it is fair to say that we would simply blink at that in that context. We would not.

The Court: I have some other problems with the NAACP's proposed order. There's no provision for appeal to the court. I have problems with a one-year moratorium on relief from the commission. But I don't think it's necessary to go into them. I'm still of the opinion that in a given set of circumstances the commission is not only the appropriate route but the only meaningful route to take. As I listened to you both I'm reminded of what is probably the (138) oldest joke in the legal profession about the judge who listens to one side and says you're right, and then listens to the other side and then says you're right. Because I think there is great strength in the views that you have each expressed. You disagree as to which are the most compelling sanctions. And my response is that we will use any and all appropriate means to implement the housing law.

Our object is not to establish abstract principles of law. Our object is not to create political martyrs or heroes. Our object is to get the housing bill. You're quite correct, Mr. Sussman, that if there is a begrudging adoption of the housing ordinance and then a practice in and pattern of frustrating implementation that is something which the court will have to address, and certainly the first directive that will go to the executive director of the office of fair housing implementation will be to alert the court at the very first sign of any such action.

In many respects the difference between the two views on the calendar may be expressed as a difference between this week and a week from now. I think there need be no concern on the part of the class on whose behalf this action was brought as to the firm commitment of this court to implementing the housing remedy ordinance. I've said on many occasions that if federal civil rights remedial orders (139) can be defeated by local political hostility we no longer live in a government of law. I do not waver from that view. The difference becomes a question of timing. This court will sign the proposed order submitted by the Department of Justice. That order provides in paragraph 1 that the city of Yonkers is ordered to enact on or before August 1, 1988—that's next Monday, that's not some vague period in the future, that's next Monday—the legislative package relating

to the long-term plan as described in section 17 of the first remedial consent decree in equity which is of course Court Exhibit A. In the event that Yonkers fails to enact that provision on or about August 1 at 10:00 a.m. on August 2 we will hold a hearing as to why it should not be held in contempt.

I agree with you, Mr. Sussman—you were agreeing with my earlier comment—that Yonkers is already in contempt. I cannot quarrel with the obvious intent and purpose of this order and of the Department of Justice given the law with respect to contempt to comply—

Mr. Sussman: I agree with that.

The Court: Very well. The sanctions with respect to contempt are the fines which we have previously talked about which by shorthand we have referred to as the bankrupting fines, because they would indeed bankrupt the city of Yonkers in a very short period of time. I want to (140) reiterate the fact that those fines are paid into the treasury of the United States. They are not put into an escrow fund. They are not subject to return. It would take an act of Congress to restore to Yonkers those fines. These are not fines such as occasionally are imposed in a labor dispute where everyone knows that once the strike is settled the first thing that happens is the fines are returned. If anyone has any doubt as to the power of the court to impose such fines I respectfully direct your attention to United States v. Marc Rich.

I advise the parties—and I note the presence in the court not only of outside counsel for Yonkers but of the corporation counsel—that it is the court's intention in addition to the specific sanctions set forth in the order which I am now signing to consider the promulgation of a commission. The precise membership of that commission and other provisions with respect to it, I think, require some further thought and analysis. But the road to implementing the housing remedy orders is going to be a direct and expeditious road and it would be foolhardy for anyone to think otherwise.

Let me just announce that there will be a conference on August 4 at 2:00 o'clock with respect to the school board and the pending matters relating to the school board's motion.

(141) Mr. Sculnick: Your Honor, I just wanted to clarify that the order that's been signed contains—that is the exact proposed order that was submitted by the justice department—in other words, it contains notice not only to the city as a corporate entity but also to the city council members in their individual representative capacities that failure to adopt Court Exhibit A will result in potential fines and imprisonment.

The Court: It is the order exactly as submitted together with the document headed comments of the United States filed with the court on July 25, 1988. Anything further?

Mr. Sussman: Yes, I'd like to make as exhibits to today's proceedings two letters. One is a letter that I wrote to Mr. Pickelle, on July 20, 1988, inquiring as to the status of the four privately held parcels with respect to the eminent domain proceedings. I have a copy of that. And the second is a letter from Mr. Pickelle to me, of July 21, 1988, in which he reports as to the status, which I think is relevant for the record.

The Court: Very well. They'll be marked NAACP's Exhibits A and B of this date.

Mr. Sussman: And deemed part of the record for any appeals as may be necessary.

The Court: And deemed part of the record in this (142) case. I have a number of matters on my calendar next week. I will set them all aside if need be. Every participant in this case must either be available next week or have a representative present. We are in all senses in what I regard as an emergency situation, and it is to be treated as such. Anything further? Thank you.

EXHIBIT O—Transcript Dated September 2, 1988.

(1) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF YONKERS, *et al.*,

Defendants.

80 Civ. 6761 LBS

September 2, 1988
2:05 p.m.

THE COURT: As I suppose we are by now all aware, at approximately 11:55 last evening the Supreme Court denied the application for stay of the city of Yonkers and granted the application for stay of the four individual city councilmen, pending the timely filing and disposition of petitions for writs of certiorari.

At 12:36 p.m. today, the Court of Appeals for the Second Circuit issued its mandate and order. If I am correct in believing that that has not been made available to counsel, I will read the crucial paragraph of that order. This is the Court of Appeals for the Second Circuit. The order is signed by Judges Newman, Miner and Mahoney. After reciting the procedural history and the action of the Supreme Court, the order provides:

"Our opinion of August 6, 1988, adjudicating appeals by the city and the council members from the (2) district court orders of August 2 imposing civil contempt sanctions, had directed that the mandate of our court would issue on September 2 unless stayed by the Supreme Court. The Supreme Court has not stayed the issuance of our mandate and accordingly we direct that the mandate issue forthwith, thereby removing any question as to the jurisdiction of the district court. However, in light of the Supreme Court's orders of September 1 with respect to the four council members, we direct the district court to stay the execution and enforcement of the mandate of this court, insofar as that mandate directs action to be taken with respect to council members Spallone, Chema, Fagan and Longo."

The order continues:

"The result is that the daily fines against the city of Yonkers imposed by the district court in its order of August 2, as modified by our opinion of August 26, resume as of today, and the daily fines and impending incarceration imposed upon council members Spallone, Chema, Fagan and Longo are stayed pending the timely filing and disposition by the Supreme Court of petitions for certiorari in accordance with the Supreme Court's order of September 1."

The status therefore is quite clear: Pursuant to the opinions of the Court of Appeals, the Supreme Court and the order and mandate of the Court of Appeals which I have just read, the daily fines imposed upon the city of Yonkers (3) resume as of today and double daily through September 9, at which time they will reach their maximum level of $1 million per day. The consequences of that is, Monday being an official court holiday, the fine payable on Tuesday, September 6, will be in the amount of $192,000, being the total of the following daily fines: today, Friday, the eighth day, the fine schedule is $12,800; Saturday, day nine, $25,600; Sunday, day 10, $51,200; Monday, day 11, $102,400—a total of $192,000 payable on Tuesday.

As previously discussed, the court will sign two orders which had been submitted to it, the signing of which had been held in abeyance because of questions which had been raised, properly

raised, concerning this court's jurisdiction. The Second Circuit has now made crystal clear that this court now has jurisdiction over the matter.

The two orders which I am signing now relate to the funding of the Board of Education and with respect to the obligations to the bondholders. They are in the form discussed at our last conference. I am giving them to the clerk now, with the direction that they be filed and docketed forthwith.

Pursuant to the order relating to the Department of Education funding then, the $192,000 will be payable in two checks, one in the amount of $106,752, which will be treated in the manner provided in the court's order of July (4) 26, and the second check in the amount of $85,248, which will be held in the manner provided in the order just signed, dealing with the funding of the Board of Education.

Does anybody have any questions or any doubts with respect to any of the arithmetic or any of the matters which I have just stated?

On July 26, this court had before it two proposals. The proposal which was adopted and which is embodied in the July 26 order is one which we referred to as classic contempt. That is the garden variety treatment for contempt of an order of a court by means of fines and potential incarceration.

This court also made reference at that time to another proposal, the creation of a Yonkers affordable housing commission, and indeed the court had made available to the parties for their consideration and comment a draft of such a proposal. The NAACP thereafter also submitted a proposal relating to a commission.

When the matter was brought before this court, the city of Yonkers opposed the concept of a commission, although it appears from the opinion of the Court of Appeals and the opinion of Justice Marshall, who together with Justice Brennan dissented from the grant of the stay, that at the appellate level the city took the position that the commission route was a viable alternative to the classic (5) contempt route.

In promulgating the July 26 classic contempt order, this court advised the parties that it did not regard the two pro-

posals as being mutually exclusive, but rather that they should be regarded as possibly sequential steps to be taken.

What we said in part, at page 10 of the transcript of July 26, is if this, that is, the fine route, goes on for a period of time, "we are not just going to permit everything in Yonkers to go down the drain, because there is still one thing which is available to us, and that is, of course, the commission route."

The action taken by the Supreme Court late yesterday evening does not in any way alleviate—indeed one might argue it intensifies—the fiscal crisis which confronts the city of Yonkers. Although the four city councilmen have been granted a respite as to the sanctions which may be visited upon them personally, they of course still have a responsibility to the citizens they represent, who will bear the brunt of these fines, which, as I have already noted, will reach the level of $1 million a day in one week, the imposition and collection of which is the result not only of action by this court but the unanimous action of the judges of the Court of Appeals for the Second Circuit and of the Supreme Court of the United States.

(6) We will meet immediately after these proceedings with counsel for the parties, to explore with them informally some thoughts that we have with respect to possible solutions of this crisis and to hear from them any thoughts that they may have on that subject.

It should be clear that the first step that must be taken is compliance with the law.

Unless there is something else that anyone wishes to say, we will adjourn these proceedings and I will confer with counsel in the jury room.

MR. SUSSMAN: One matter, your Honor. Miss Hill, the new executive director of the office of implementation, did contact me a few days ago regarding the preparation of an order preserving the integrity budgetarily of her operation. Unfortunately, I have not yet had an opportunity to prepare the order. I will have it to the court on Tuesday. I apologize to the court.

MR. MERCAROLA: Counsel to Councilman Spallone. May I inquire whether a stay would be necessary with regard to the stay of contempt with regard to Councilman Spallone?

THE COURT: No. I think the orders of the Supreme Court and the mandate and order of the Second Circuit which I have just read are self-executing. No further document is needed for that purpose.

MR. MARCAROLA: Your Honor, then, with regard to (7) your invitation to meet with you, that would extend only to the parties and not to the councilmen?

THE COURT: Do you wish to be present?

MR. MERCAROLA: No.

THE COURT: I am not directing that you be present. If you do not wish to be present, you need not attend.

MR. MERCAROLA: This is new. May I consult with my client?

THE COURT: Certainly.

Mr. Sculnick.

MR. SCULNICK: Your Honor, on behalf of the city and in anticipation of the invitation you have just extended to all parties to discuss the crisis facing the city, I would move on the city's behalf that the court enter a stay of the fines as against the city during the period of time that we seek to resolve the matter through negotiations.

THE COURT: Application denied.

Let me say this, and it was one of the reasons I did all of the arithmetic and the timetable: If between now and Tuesday, when the $192,000 is due and payable, I am satisfied that we have reached a point which makes it appropriate that the fines be suspended or the payment stayed, you may renew that application, but not until that time, and certainly not until a time when there is a binding (8) commitment to comply with the orders of the court.

We are adjourned then *sine die*.

EXHIBIT P—The Affordable Housing Ordinance.

AGENDA

CITY COUNCIL OF THE CITY OF YONKERS
STATED MEETING
FRIDAY, SEPTEMBER 9, 1988

GENERAL ORDINANCE

G.O. NO. 13-1988

BY MAYOR WASICSKO

NO. 1

A GENERAL ORDINANCE AMENDING G.O.#24-1968, (COMMONLY KNOWN AS THE ZONING ORDINANCE OF THE CITY OF YONKERS) AND ADDING A NEW ARTICLE XV ENTITLED "AFFORDABLE HOUSING ORDINANCE OF THE CITY OF YONKERS".

ADOPTED AT A STATED MEETING HELD SEPTEMBER 9, 1988 BY A VOTE OF 5 TO 2
VICE MAYOR SPALLONE AND COUNCILMEMBER FAGAN VOTING NO.

Article I—General

1. Title

This Chapter shall be known as the "Affordable Housing Ordinance" of the City of Yonkers.

2. Declaration of Purpose

This Affordable Housing Ordinance is adopted to comply with the Long Term Housing Plan Order entered on June 13, 1988 in the United States District Court for the Southern District of New York in the case of *United States of America and Yonkers Branch—NAACP et. al. v Yonkers Board of Educa-*

tion, et. al., and in furtherance of the following related and more specific purposes:

a. To implement a program whereby all new multi-family housing developments in East and Northwest Yonkers will be required to provide assisted housing units not to exceed 20% of the maximum aggregate number of units authorized for construction in exchange for a variety of zoning and other mandated incentives as set forth in Section 8 of the Long Term Housing Plan.*

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*The examples set forth below illustrate the types of Mandatory Incentives which the City shall be prepared to implement:

—Increase the maximum permitted Height of a Building.

—Increase the maximum permitted Floor Area Ratio of a Building.

—Change the formulas set forth in Section 107-55 (B) of the Yonkers Code for the calculation of floor area ratios for mixed use buildings so as to lower the contribution of stories devoted exclusively to non-residential uses.

—Reduce the minimum permitted Lot Width or Lot Area for apartment houses.

—Reduce the minimum permitted Lot Area per family.

—Reduce the minimum permitted Rear Yard or minimum permitted Front Yard.

—Grant the owner of multi-family rental housing a full tax abatement on city real estate taxes for the percent of units which are assisted but not to exceed 50 percent of the total number of units in the development, including both assisted and non-assisted units.

—Vary the extent and/or duration of tax abatement depending on the extent to which the owner elects to carry a larger than required share of assisted units allocated to households in an income group as described herein.

—Grant a tax abatement on City real estate taxes to households buying assisted units. An additional tax abatement may be granted to up to 50 percent of the total number of units being constructed to be used to skew the monthly payments of the non-assisted units so as to further reduce the monthly payments required of the assisted units.

—Vary the extent and/or duration of the tax abatement granted to households buying assisted units, depending on the household's income level.

(Footnote continued on following page)

b. To provide for the construction of housing units for rental or sale that will be affordable to households earning between 50% and 120% of the New York Metropolitan Area median income.

c. To provide for charges in existing zoning requirements and increase in a land use densities so as to facilitate construction of multi-family residential buildings containing a mix of market rate and assisted units.

d To provide for a variety in the size of assisted units.

e. To specifically target the areas of East and Northwest Yonkers for the development of assisted housing.

f. To promote the provision of assisted housing in a dispersed manner so as to avoid the undue concentration of both public and assisted units in any neighborhood of Yonkers.

(Footnote continued.)

—Waive a portion of all application or processing fees which would otherwise be payable by developers seeking building-related approvals from the City.

—Cause funds in the Affordable Housing Trust Fund (AHTF) to be applied (subject to HUD regulations) to site preparation or improvement at a site to be used for the construction of assisted units.

—Provide that, notwithstanding anything to the contrary contained in Chapter 107 of the Yonkers Code, a particular housing development may contain a certain number (or percentage) of units in excess of the number which would otherwise have been allowed by such Chapter.

—Cause the Industrial Development Authority (to the extent it is within the power of the City to cause such result) to provide assisted financing for the construction or permanent financing of the portion of a housing project represented by assisted units.

—Vary the extent of assisted financing from the Industrial Development Authority depending on the extent to which the owner or developer elects to carry or sell a larger than required share of assisted units allocated to households in an income group as described herein.

g. To provide measures to ensure that assisted housing units remain affordable for specified periods of time as required by the Long Term Housing Plan.

h. To foster to the extent possible the use of such architectural and design devices as will minimize the visual impact of such inclusionary housing developments on the surrounding community and any distinction between assisted and market-rate units.

3. Effectiveness of Ordinance

This ordinance shall be in effect from the date of enactment to such time as the goal of 800 assisted units have been produced in accordance with Section 15 of the First Remedial Consent Decree in Equity entered by the United States District Court for the Southern District of New York on January 28, 1988.

Article II—Definitions

4. Definitions of terms

As used in this chapter, the following terms shall have the meaning indicated:

ASSISTED UNIT—a dwelling unit which has been made affordable to a specified income group as defined herein, and for which afordability controls as defined in Article V shall apply.

DWELLING UNIT—a room or group of rooms intended for occupancy as separate living quarters, with cooking, sleeping and sanitary facilities for the exclusive use of a single household.

FIRST REMEDIAL CONSENT DEGREE IN EQUITY—order entered on January 28, 1988 in the United States District Court for the Southern District of New York in the case of *United States of America and Yonkers Branch—NAACP et. al. v. Yonkers Board of Education, et. al.*, which sets forth certain agreements of the parties to that

litigation, and certain actions which the City of Yonkers is required to take in connection with the consensual implementation of Parts IV and VI of the Housing Remedy Order.

HOUSING REMEDY ORDER—order entered on May 26, 1986 in the United States District Court for the Southern District of New York in the case of *United States of America and Yonkers Branch—NAACP et. al. v Yonkers Board of Education, et. al.*

INCLUSIONARY DEVELOPMENT—a multi-family housing project in which a proportion of the dwelling units are assisted units.

LONG TERM HOUSING PLAN—Order entered on June 13, 1988 in the United States District Court for the Southern District of New York in the case of *United States of America and Yonkers Branch—NAACP et. al. v Yonkers Board of Education, et. al.*, which set forth certain actions to be taken by the City of Yonkers required by Section VI of the Court's May 26, 1986 Housing Remedy Order.

MULTIFAMILY DEVELOPMENT—one or more residential buildings, each containing three or more attached dwelling units. Multifamily developments shall include, but are not limited to, townhouses, garden apartments, flats, mid-rise apartment buildings, and high rise apartment buildings.

OFFICE OF IMPLEMENTATION—Office created by the United States District Court for the Southern District of New York in the case of *United States of America and Yonkers Branch—NAACP et. al. v. Yonkers Board of Education, et. al.* to monitor and insure implementation of the Housing Remedy Order, with responsibilities and functions as enumerated therein and as set forth as follows:

—To work with developers in determining the incentives they require to provide assisted units at the sale or rental levels set by this ordinance based on an examination of project costs, projected sales or rental receipts, pro formas, etc.

—To ensure that construction of the assisted units is taking place according to the phasing schedule set forth in this or-

dinance, and that market rate units are not being occupied in advance of the schedule.

—To review and approve proposed sales prices and rent levels of assisted units and to ensure that the actual sales prices and rentals advertised are consistent with the standards of this ordinance and alternatively, to determine the sales prices and rentals to be applied.

—To review, and act upon, requests by developers for changes in sales prices or rent levels of assisted units, resulting from changes in income levels, mortgage interest rates, etc.

—To review and approve the proposed marketing plans for assisted units and to ensure that marketing provisions of this ordinance are fully and effectively carried out.

—To review and approve of procedures to be used in the screening of prospective tenants or buyers of assisted units to ensure that only households meeting the prescribed income qualifications are processed for occupancy of the assisted units.

—To ensure that closing or other ancillary costs for assisted units are consistent with this ordinance.

—To review and approve selection priorities for assisted units and to ensure that the established priorities in selection of tenants or buyers of assisted units are respected.

Article III—Districts; Applicability

5. Districts; Provisional Districts; Boundary Locations

a. Districts

This ordinance constitutes an overlay district to the M, MG, B, A and BA zones and such other zones in which multifamily housing is or may be permitted in East and Northwest Yonkers, including those zones that permit multifamily housing as a special exception use. This ordinance shall apply to multifamily housing, including projects (whether or not presently in the planning stage) which will require zoning changes, variances, special exceptions,

or other discretionary approvals from the City to begin construction, as of the date of this ordinance.

In addition, the Long Term Housing Plan Order specifically permits developers to apply for zoning changes to build multifamily inclusionary developments in any district in East and Northwest Yonkers not zoned M, MG, B, A and BA and to seek the incentives offered herein.

b. Provisional Districts. A developer may propose to build a multifamily inclusionary development in the M, MG, B, A and BA zones in areas other than East and Northwest Yonkers, including those zones that permit multifamily housing as a special exception use; however nothing contained herein shall require developers in such areas to build multifamily inclusionary developments. Developers may also apply for zoning changes to build multifamily inclusionary developments in areas other than East and Northwest Yonkers not zoned M, MG, B, A and BA and to seek the incentives offered herein so as to make the provision of assisted housing units economically feasible.

The City shall have the option of granting the incentives enumerated and referred to herein to facilitate the provision of multifamily inclusionary development in areas other than East and Northwest Yonkers. These incentives may be made available for construction of up to 400 assisted units in such areas, for which the City shall be credited (toward its goal of 800 assisted units as set forth in Article I, Section 3 of this ordinance), with one unit of assisted housing for every two assisted housing units constructed up to a maximum credit of 200 units.

c. Boundary Locations. For purposes of this ordinance "Northwest and East Yonkers" shall include all land in Yonkers north and east of the area bounded by: Glenwood Avenue Extending east from the Hudson River to Father Finian Sullivan Drive; Father Finian Sullivan Drive north to Lake Avenue; Lake Avenue east to Saw Mill River Road; Saw Mill River Road south to Ashburton Avenue; Ashburton Avenue east and south to the Saw Mill River

Parkway; and the Saw Mill River Parkway to the City of Yonkers municipal boundary with the City of New York.

Article IV—Supplemental Regulations

6. Required Number and Distribution of Assisted Units in Inclusionary Developments.

a. Multifamily housing development shall be inclusionary developments containing a set-aside of assisted units equal to 20 percent of the maximum aggregate number of units authorized for construction in such developments, except as provided in paragraphs b and c.

b. In multifamily inclusionary developments in the A and BA zones, and in such other zones which presently permit a density of sixty (60) units per acre or more, the required set-aside of assisted units may be reduced, but no less than 10% of the maximum aggregate number of units authorized for construction in such development shall be set-aside as assisted units, provided that the maximum density bonus that will then be given to the developer shall not be in excess of 50 percent over the permitted zoning. If the bonus sought is in excess of the 50 percent over the permitted zoning, the 20 percent set-aside shall apply.

c. Notwithstanding paragraphs (a) and (b), the City may exempt any multifamily housing development of fewer than ten units from inclusionary development; provided, however, that such exemption shall not be applied to circumvent the set-aside requirements set forth in paragraphs a and b of this section.

7. Income Distribution.

a. Multifamily inclusionary development shall be required to include an income distribution for assisted units to ensure that:

(1) 1/8 of the total number of assisted units be provided on terms affordable to families earning no more than 50% of the median income in the New York Metropolitan Area;

(2) 3/8 of the total number of assisted units be provided on terms affordable to families earning no more than 80% of the median income in such Area;

(3) 3/8 of the total number of assisted units be provided on terms affordable to families earning no more than 100% of the median income in such area; and

(4) 1/8 of the total number of assisted units be provided on terms affordable to families earning no more than 120% of the median income in such area.

Provided, however, that a developer may propose to modify the income distribution of assisted units set forth above subject to approval by the City.

b. Notwithstanding paragraph (a) of this secstion, if the aggregate minimum number of assisted units to be allocated to any of the four income groups is attained before the minimum is reached for remaining groups, assisted units constructed thereafter shall be allocated (in the same proportion) only to income groups whose minimum has not theretofore been attained.

8. Bedroom Distribution. Multifamily Inclusionary Development shall provide the following bedroom distribution for the assisted units:

(a) the number of two-bedroom assisted units shall equal at least 60% of the total number of assisted units;

(b) the number of three-bedroom (or larger) assisted units shall equal at least 30% of the total number of assisted units;

(c) the number of one-bedroom assisted units may not exceed 10% of the total number of assisted units.

9. Affordability Criteria

a. Definition

The term "affordable", as used in this ordinance shall mean with respect to each income category described in this ordinance, assisted housing units (i) sold at a price entailing a monthly carrying cost (assuming a 10 percent downpayment, a 30-year self-liquidating mortgage, including principal and interest payments, property taxes, homeowners association fees, maintenance or carrying costs, but excluding utilities) not exceeding at any time 28 percent of the annual gross income of the household occupying the assisted unit or (ii) rented at a rent (including an allowance for utilities) not exceeding at any time 30 percent of the annual gross income of the household occupying the assisted unit.

b. Term; Transfer Restrictions and Occupancy Criteria

(1) Assisted housing units shall be rented or sold only to households meeting (at the time of rental or sale) the income qualifications contemplated in Section 15 of the First Decree and Article IV, Section 7 of this ordinance as from time to time adjusted for the New York Metropolitan Area. Such units shall be the primary residence of the occupants, and subletting and assignments shall be prohibited.

(2) All assisted housing units subject to purchase shall have resale-price limitations (enforced by covenants running with the land, restrictions on registration of title, or any other appropriate legal mechanism approved by the City) which will ensure that for a period of thirty years from the time of their first sale such housing units are sold or re-

sold only to, and at a price affordable to, a household which is, at the time of the purchase, in the same group (referred to in Section 15 of the First Decree and as at that time adjusted) as was the seller at the time such previous owner first occupied the unit.

(3) The owner of assisted housing units for rent shall be required to assure that, for a period of thirty years from the time of first rental, such units are affordable to, and are re-rented only to, a household which is, at the time of re-rental, in the same income group (referred to in Section 15 of the First Decree and as at that time adjusted) as was the previous tenant at the time such previous tenant first occupied the unit. Assisted units for rental may be converted to units for sale subject, however, to the same ownership eligibility standards as applicable to units for sale for the remainder of the thirty-year period from original occupancy referred to in the previous sentence. All tenants in place at the time initial notice of conversion is provided who meet the income qualifications set forth in Article IV, Section 7 of this ordinance (as at that time adjusted) shall be permitted to purchase their unit at an affordable price to them as defined herein.

(4) The affordability and other restrictions on resale and/or occupancy shall not apply to (i) the transfer of ownership of an assisted unit between spouses or former spouses ordered as a result of a judicial decree or divorce or separation agreement (not including transfers to third parties), (ii) the transfer of ownership of a unit between family members as a result of inheritance, and (iii) formerly HUD-insured multifamily projects which, following default on the mortgage, HUD acquires or is mortgagee in possession ("MIP"), to the ex-

tent that the provisions are inconsistent with applicable HUD statutes and regulations regarding management or disposition of HUD-owned projects or projects for which HUD is MIP; provided, however, that transfers referred to in clauses (i) and (ii) do not extinguish such restrictions (whatever be the legal mechanism through which the restrictions are enforced) which shall be fully complied with in the event of any subsequent sale or rental of a unit not specifically exempted hereby. An exempted transfer as heretofore provided in this paragraph (d) shall not toll the running of the thirty-year period referred to in subparagraph 2 hereof.

(5) This Section shall not be interpreted as in any way affecting or diminishing, and shall apply together with, occupancy criteria (to be applied in good faith by the City or each developer) substantially of the type set forth in 24 C.F.R. §960.205 to ensure that the personal and financial background of each potential tenant or owner of assisted units will not be detrimental to the viability of the housing development.

(6) To the extent not inconsistent with other applicable occupancy and financial criteria, the City shall endeavor to give occupancy priority in the following order to:

a) persons who, between January 1, 1971 and the date assisted housing is made available, have been residents of public or subsidized housing in the City of Yonkers. Such persons shall be given the first opportunity to apply for such housing, which opportunity shall be afforded up until thirty (30) days following the date the final assisted housing units pursuant to this Ordinance are made available. Occupancy

choice from among such persons applying shall be on a first-come, first-served basis;

b) residents of the City of Yonkers; and

c) persons employed in the City of Yonkers.

(7) The Office of Implementation (as defined in Article II, Section 4 of this ordinance) shall be responsible for pre-screening applicants who wish to occupy (as tenants or purchasers) assisted units and for maintaining a list of such prescreened applicants. Owners or developers of housing projects containing assisted units may be allowed to select tenants or purchasers of assisted units from among the applicants pre-screened by such Office. The Office of Implementation shall be responsible for monitoring the good faith application of any discretion vested in such owners or developer with respect to the choice of tenants or purchasers of assisted units.

10. Architectural Integration

Developers of multifamily inclusionary developments shall make no locational distinctions between assisted and other units, provided that for any building eight or more stories in height, the top two floors may be reserved for market rate housing. Assisted units, whether for sale or rental, shall meet HUD minimum property standards with respect to square footage. Assisted units need not be furnished with each and every amenity as a developer may choose to include in a market rate unit. Developers shall be encouraged to foster, to the extent feasible, the use of such architectural and design devices as will minimize the visual impact of such housing developments on the surrounding community and any distinction between assisted and market units.

11. Staging

In all multifamily inclusionary developments, the following staging schedule shall apply for rental or sale units:

Percentage of Market Rate units Receiving Certificates of Occupancy	*Percentage of Assisted Units Receiving Certificates of Occupancy*
Up to 25%	0% (none required)
25% + 1 unit	At least 10%
50%	At least 50%
75%	At least 75%
100%	100%

Certificates of occupancy shall be issued to market rate units when the required percentage of assisted units for the respective stage has been completed.

Article V

Zoning Regulations; Incentives

12. Applicability

The zoning regulations for multifamily inclusionary developments shall allow for departures from the provisions of Table 107-7 of the City of Yonkers Zoning Ordinance.

13. Zoning Regulations

To promote the goals of this ordinance, and specifically to make the provision of assisted housing setasides feasible within inclusionary developments, the City shall offer incentives to developers of multifamily inclusionary developments which may include, but are not limited to, the following departures from underlying zoning:

a. Increase of the Maximum Permitted Height of a Building.

b. Increase of the Maximum Permitted Floor Area Ratio of a Building.

c. Change of the formulas set forth in Section 107-55 (B) of the Yonkers Zoning Ordinance for the calculation of floor-area ratios for mixed-use buildings so as to lower the contribution of stories devoted exclusively to non-residential uses.

d. Reduction of the Minimum Permitted Lot Width or Lot Area for apartment houses.

e. Reduction of the Minimum Permitted Lot Area per Family.

f. Reduction of the Minimum Permitted Rear Yard or Minimum Permitted Front Yard.

Notwithstanding anything to the contrary contained in Chapter 107 of the Yonkers Zoning Ordinance, a particular housing development may contain units in excess of the number which would otherwise have been allowed by such Chapter.

Departures from underlying zoning regulations for multifamily inclusionary developments shall be determined based on submissions made by the developer as provided in Article VI, Section 14 of this ordinance taking into consideration such factors as, but not limited to: the provisions of the underlying zoning, including but not limited to height, bulk and density; the impact of development on surrounding land uses and neighborhoods; the allocation to specific income groups of assisted units which the developer (subject to specific provisions of this ordinance) elects to make; the degree to which assisted financing/grants of mandated incentives (as set forth in Section 8 of the Long Term Housing Plan) are available; prevailing economic and housing-market conditions; and allowance for a reasonable profit margin.

Article VI— Expedited Review; Organizational Structure

14. Expedited Review; Submission

a. Expedited Review. The City shall establish an expedited review process for multifamily inclusionary housing projects pursuant to this ordinance to include priority scheduling and expedited review and negotiation.

b. Pre-Submission Review by Office of Implementation

Developers of multifamily inclusionary projects are encouraged to seek the assistance of the Office of Implementation in preparing conceptual development plan submissions as set forth in paragraph (c) below. The Office of Implementation shall work with developers in determining the types of zoning and other incentives required to make the provision of assisted housing set-asides feasible within inclusionary developments, and is specifically empowered to make recommendations to the City as to the need for any mandated incentive not expressly set forth in Article V, Section 13 of this ordinance, including tax abatement, waiver of applications and/or processing fees for building approvals, use of Affordable Housing Trust Funds, and/or use of financial assistance from the Industrial Development Authority.

Developers of multifamily inclusionary projects intending to make application to the City for tax abatement, waiver of application and/or processing fees for building approvals, funding from the Affordable Housing Trust Fund and/or financial assistance from the Industrial Development Authority are required as part of the pre-submission review process to obtain recommendations from the Office of Implementation concerning the granting of such assistance before making application to the City Council, as set forth below. The Office of Implementation's recommendations shall be for-

warded to the Yonkers Planning Board and Yonkers City Council.

c. Submission/Development Review/Approval

(1) After having sought the assistance and recommendations of the Office of Implementation as outlined in paragraph (b) above, developers of multi-family inclusionary projects shall submit to the Yonkers Planning Board a conceptual development plan, which shall contain the following information:

(a) General location of existing and proposed structures, including the location of the assisted housing units.

(b) General type of existing and proposed uses, including a description of the proposed bedroom and income distributions, and proposed tenure structure of the assisted housing units.

(c) Conceptual rendering of the exterior design treatment of the building(s) and a typical floor plan, including a floor plan showing where the assisted units will be located.

(d) A completed Environmental Assessment Form (EAF).

(e) Existing topography and soils information, and general grading and drainage proposals.

(f) A map delineating those areas on the site comprising floodplains, wetlands, lakes, ponds, streams and other surface water bodies, and areas with slopes in excess of 15%, and a statement as to what, if any, disturbances are

contemplated in these areas, and the extent to which any mitigation measures are proposed.

(g) Existing and proposed internal streets, driveways, and points of access to existing mapped streets.

(h) Parking and loading areas, showing size and location of stalls and aisles.

(i) Landscaped areas and proposed screening.

(j) A written statement and supporting documentation indicating the traffic impacts of the project on the adjoining roadway network, and what, if any, off-site traffic improvements are proposed.

(k) A written statement and supporting documentation indicating whether any land or buildings listed on the State or National Registers of Historic Preservation will be altered and describing the nature of the proposed alterations.

(l) A statement and supporting documentations as to the capacities of existing water and sewer lines and related facilities, and that such water and sewer lines are adequate; if not adequate, proposed improvements that are required.

(m) A statement and supporting documentation as to the capacities of existing gas and electric lines and related facilities, and that such gas and electric lines are adequate; if not adequate, proposed improvements that are required.

(n) Existing and proposed location and type of major signs and lighting.

(o) A written and graphic description of various aspects of the conceptual development plan, including any proposed phasing of development activities, and a statement of the applicant's interest in the land as well as evidence to support the applicant's right to make the application and use the land.

(p) A written statement indicating which, if any, sources of municipal assistance or funding (*e.g.*, tax abatements, financing, grants) the applicant seeks to use and specifying the type of assistance, if any, that will be sought from the County, State of Federal governments.

(q) A written statement describing the types of incentives that the applicant considers necessary and sufficient to make the provision of the assisted housing set-aside economically and socially feasible, and the specific provisions of the underlying zoning from whch the applicant is requesting departure as set forth in Article V, Section 13 of this Ordinance.

(r) A written statement and supporting documentation describing the reasons for the required departures from the underlying zoning, including but not limited to: a financial pro forma showing likely profit margins with and without the departures being requested.

(s) A written statement and supporting documentation indicating the manner in which the applicant intends to administer the assisted units in compliance with Article IV, Section 9 of

this ordinance, including sales prices and/or rent levels for the assisted units.

(t) A written and graphic description of the area within a 400 foot radius from the property and statement and supporting documentation as to the impacts that the project will have on such area.

(u) A written statement and supporting documentation projecting the additional number of school-age children generated from both the market rate and assisted units and their impact on the existing school system. The developer shall simultaneously transmit such written statement and supporting documentation.

(2) The Planning Board through the Planning Director shall have fifteen (15) working days to request additional information from the applicant, otherwise the conceptual development plan shall be deemed complete. The Planning Board shall then have forty-five (45) working days from the date on which the conceptual development plan is deemed complete to act upon the application, otherwise the application shall be deemed approved. The building regulations contained in the conceptual plan shall be deemed permitted only in the manner stipulated by the Yonkers Planning Board in its approval. Any material or substantial amendment or amendments to the conceptual plan must be submitted to the Yonkers Planning Board for approval in the same manner as the original plan.

(3) Upon approval of the conceptual development plan by the Yonkers Planning Board, as set forth in Subsection (2) above, the developer may elect to make application to the Yonkers City Council for any other incentives considered necessary to effec-

tuate the multifamily inclusionary development as proposed (but not expressly set forth in Article V, Section 13 of this Ordinance), including tax abatement, waiver of application and/or processing fees for building approvals, funding from Affordable Housing Trust Funds, and/or financial assistance from the Industrial Development Authority. Upon receipt of such applications, the City Council shall have 30 days to act upon the request.

Developers applying for such incentives shall submit to the Yonkers City Council the complete conceptual development plan as submitted to and approved by the Planning Board.

(4) Developers of multifamily inclusionary projects shall include in the application for building permits a site plan containing the following:

(a) Property lines and related street, right-of-way and easement lines as determined by survey.

(b) Location of existing and/or proposed buildings and structures and uses, including the location of the assisted units.

(c) Layout of existing and proposed off-street parking areas showing the details of aisles, driveways and each parking space.

(d) Existing topography of the site and immediately adjacent property as revealed by contours or key elevations as may be required by the City Engineer, and any proposed regrading of the site.

(e) Existing and proposed stormwater drainage facilities, sidewalks, curbs, curb cuts and driveway aprons and similar structures.

(f) Existing and proposed stormwater drainage facilities, sidewalks, curbs, curb cuts and driveway aprons and similar structures.

The Director of the Bureau of Housing and Buildings shall forward one (1) copy each of the site plan and accompanying documentation to the Planning Director who shall insure consistency between the site plan and the approved conceptual development plan before issuance of a building permit.

No building permits shall be issued for any such building, structure or use until the Director of the Bureau of Housing and Buildings has received a written assurance of consistency from the Planning Director, except that if said Director shall fail to report within fifteen (15) days, the proposed site plan shall be considered approved. The Planning Director's review of the site plan shall note any changes from the approved conceptual plan. The Director shall not approve any material or substantial changes to the approved conceptual plan which are not in accordance with the declaration of purpose of this ordinance; any such changes shall require approval of the Planning Board.

If the developer is required to make any material or substantial amendments to the site plan based upon the review of the Planning Director, the Director of the Bureau of Housing and Buildings shall forward again amendments to the Planning Director for re-approval prior to issuing any building permit for such amendment.

(5) If the developer does not file an application with the Director of the Bureau of Housing and Buildings and the Director of the Bureau of Housing and Buildings does not issue a building permit, within two (2) years after the Yonkers Planning Board's approval of a conceptual plan, then the

zoning governing the land delineated in the conceptual plan shall be voidable by the City, so as to permit the development of other multifamily inclusionary developments in Yonkers.

EXHIBIT Q—Transcript of Hearing Dated September 14, 1988.

(1) UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF YONKERS, *et al.*,

80 Civ 6761 LBS

Defendants.

September 14, 1988
10:15 a.m.

THE COURT: Are counsel present in United States v. Yonkers?

MR. SUSSMAN: Yes, your Honor.

THE COURT: By letter dated September 12, 1988, there was forwarded to the court a copy of a resolution of the City Council of Yonkers dated September 9, 1988, adopting, without condition or qualification, general ordinance number 13-1988, commonly known as the affordable housing ordinance of the City of Yonkers. This satisfies the terms of the court's order of July 26, 1988, and Yonkers has thereby purged itself of its contempt.

As the court indicated in telephone conversations with the parties on September 9th, we were able to intercept the deposit

into the United States treasury and the special (2) account of the $819,200 paid by Yonkers on September 9th for fines incurred on September 8th. Does anyone object to the return to the City of Yonkers of the two checks totaling $819,200?

MR. HEFFERNAN:No, your Honor.

MR. SUSSMAN: No, your Honor.

THE COURT: Mr. Keneally, will you deliver to Mr. Pickelle the two checks.

The previous deposits have been deposited into the United States treasury and the special account for the board of education. The sums paid to the United States treasury are not refundable, by act of this court.

For the past several weeks this litigation has presented an issue which, as the court noted on several occasions, far transcends the City of Yonkers and far transcends the particular orders in question. At issue was the fundamental question of whether a community could refuse to comply with lawful federal court orders to implement a remedy for long-standing violations of civil rights. We hope that issue has been laid to rest and that we will no longer have to deal with a housing remedy order in terms of confrontation, court power, contempt proceedings. The hope is that we can proceed on a more constructive track.

It may be appropriate, however, to remind the parties of the second paragraph of the finding of contempt (3) order dated August 2, 1988. That paragraph reads, "If at some later point the city purges itself of contempt and then resumes its contumacious acts, the level of fines to be imposed for such contempt shall begin at the level at which the fines had previously ceased."

Also forwarded to the court by Mr. Pickelle were two additional resolutions adopted by the city council on September 9th. One of these advises that the council "intends, with the permission and consent of the court, to amend the affordable housing ordinance.. As the parties were advised on prior occasions, if the city or, indeed, if any party wishes to submit a proposed amendment to the affordable housing ordinance, it should do so in writing and promptly so that all parties can examine carefully and comment on the proposed amendment.

We do, however, want to move forward with as much speed as the circumstances will permit. This case is eight years old. There is not a single resident of Yonkers who is a member of the plaintiffs' class, that is, the class on whose behalf the suit was brought, whose housing opportunities have in fact been increased by virtue of this litigation. I mention that fact and that concern because it is a significant factor in matters which we will continue to discuss and consider.

May have proposed amendment to the (4) affordable housing plan, in writing, by close of business on Friday, September 23rd. May we have comments with respect to the proposed amendment by the close of business on September 30th.

Another resolution forwarded by Mr. Pickelle and adopted by the Yonkers City Council on September 9th, resolution number 193-1988, speaks of modification of the prior orders of this court with respect to the 200 units of public housing. The court's position with respect to any such modifications has been clear and consistent. We stated on August 5th and, I believe, on at least two occasions thereafter, that the court would continue to welcome any proposals the City of Yonkers wishes to advance that would have the support of its residents and of the parties and that would provide the housing needed to remedy the

long-standing civil rights violation. We will consider carefully all proposals which meet these criteria. At the same time, we will, of course, move ahead with the existing plan pursuant to the timetable previously established, unless and until that plan is modified.

The court has received a great many expressions of concern from interested parties who are fearful that this court might modify the existing housing plan, that is, the plan embodied in the previous housing remedy order and in the consent decree, without having afforded them a full (5) opportunity to comment. There need be no such concern. For the reasons I have already referred to, that is, the long delays which have been experienced in furnishing any real relief or benefit to the plaintiff class, we will set relatively short periods of time for comments. We will set definite dates. We will not adopt any modifications

without having considered the views of all the parties and consulted with our housing expert Oscar Newman.

Let me digress for a moment and comment on the role of the outside housing adviser, Mr. Newman. Let me make clear that regardless of whatever roles he previously occupied, that is, occupied by virtue of having at one time been an expert retained by and consultant to the City of Yonkers, Mr. Newman's sole role at this time is as an adviser to the court. He will not discuss with the parties or others or with the media his views or the court's views as to any sites or any proposed modifications of the plan. His opinions will be given solely to the court, and the court will then determine whether and how those views are to be shared by the parties. I make this statement at Mr. Newman's request so that his role will be clarified and so that there be no confusion in that regard.

I have read the resolution and some of the changes which it proposes. I have a number of questions. I suppose the threshold question that I have is whether the (6) City of Yonkers, independently or jointly with the NAACP, has reached a point in its consideration of this matter in which it is prepared to make a specific proposal for the modification of the existing plan. Has that point arrived? Is there a specific suggestion or proposal?

MR. SCULNICK: Yes, your Honor, and Mr. Sussman is handing up to the court a document which embodies the recommendations for the improvements in the public housing portion as well as the long-term housing portion of the plans. These represent agreements reached between the city and the NAACP and items to be proposed to the court for approval.

THE COURT: As is obvious, this is a document which is being handed to me now. I am seeing it for the first time. Has this been distributed to the other parties?

MR. SCULNICK: This morning.

MR. HEFFERNAN: This morning, your Honor.

THE COURT: We will mark this as Court Exhibit A.

(Court Exhibit A was marked for identification)

MR. SUSSMAN: For one clarification on this, your Honor. It was my understanding, obviously mistaken, that the parties were going to meet with the court in chambers this morning,

and one purpose of the meeting would be to go over this document and discuss it and perhaps get it scheduled for consideration and other parties' comments. (7) That was why we were going to present it in that fashion this morning informally to the court.

THE COURT: My understanding is, because we have spent two years and every reasonable effort should be made not to have unnecessary delays, that this represents a proposal by the City of Yonkers which has the support of a majority of the members of the City Council of Yonkers and which represents a considered recommended change on the part of the city. Is that accurate?

MR. SCULNICK: That is correct, your Honor.

THE COURT: I will meet with the parties in chambers, but I would like to make some points and raise some questions. You may choose to answer the questions in open court or you may wish to defer responding until some later date. As I indicated, we will set a timetable.

Not having had the benefit of this document but just having had the benefit of the resolution, the questions which came to mind were with respect to the type of housing to be constructed and the recommendation of stand-alone townhousing units, whether there had been prepared or was being prepared any cost analysis or identification of funding sources. With respect to the St. Joseph's Seminary site, the parties need hardly be reminded of this court's strenuous efforts in open court and in conferences in March and again in May, seeking to get the City Council to either (8) designate an alternate site or authorize the court to do that. Does Court Exhibit A envision the substitution of a site for the St. Joseph's site?

MR. SUSSMAN: Yes, your Honor. As well as the Helena site, just so that is clear.

THE COURT: My understanding of the Austin site, apart from all other considerations with respect to that site, is that it is subject to a reversionary right on the part of the county. I will want to inquire whether there have been obtained assurances from the county that that reverter right will be relinquished.

Because we have heard in the past several days, and welcomed hearing in the past several days, assurances of goodwill and cooperation from various sources, might I suggest that some of those assurances may be meaningfully implemented. This might be an appropriate time for the City of Yonkers to request of the county a release of its right of reverter with respect to all of the land owned by the City of Yonkers not actually used for parkland to the extent to which such land would be used for purposes of implementing the housing remedy order? That is a very real contribution that the county could make which would greatly enhance the resources and the flexibility in dealing with all aspects of the housing situation.

Two other comments, and then I will hear from the (9) parties either in open court or in chambers if they wish.

There was reference in the resolution to the management of public housing units by a, quote, nonprofit organization on which will be represented a member of the clergy, unquote. My question is, to what extent does that require any action by the court or by HUD? Is this something which the Yonkers MHA may do on its own authority, that is, subcontract the management of particular housing units to a nonprofit entity? I don't know whether that requires HUD approval or does not require HUD approval. That is something I would like to be informed about.

The resolution says that within 30 days of the approval by the court of a modification of the consent decree, a consultant will be retained to study the management of existing public housing in Yonkers. I confess to be at a total loss to understand why such a study is linked or conditioned on a modification of the consent decree. Surely, that is something that Yonkers is free to do now without court approval or intervention or the approval or intervention of any of the parties.

What I would like to do is to set a timetable for a response by the Department of Justice, by HUD, by the school board, and the opportunity for comment by other interested groups in the community to Court Exhibit A. This involves one additional site

(10) MR. SCULNICK: Yes, your Honor.

THE COURT: Mr. Herald, the Austin Avenue site we are not hearing about now for the first time in this case. Has HUD done any study or analysis of the Austin Avenue site?

MR. HEROLD: I'm not sure, your Honor. I think it may have done what we called a preliminary evaluation of the site sometime in the past, but not a full preapproval review. It may be necessary to go out and look at the site again.

THE COURT: What I would like to do is set the end of this month as the time for all comments. I have very much in mind that it is at the end of this month that HUD will have completed its review of the pending requests for proposals on the existing plan, and so we will have before us the existing plan and HUD's comments on a request for proposal. We now have the city's recommendations, and we will have the comments of the other parties.

MR. HEROLD: If possible, your Honor, I would like to request that any HUD comment to this proposal not require any sort of additional review of the Austin Avenue site unless it is determined to go forward with that so that the individuals involved may devote their attention to reviewing the existing RFP.

THE COURT: I want to defer that. I want to make (11) two comments on that. Nothing, nothing, that has been said or that has transpired since the timetable was established with the court and the parties relating to the processing of the existing plan and the RFP alters that timetable.

Manpower is not to be diverted from that review or process.

With respect to the Austin site, I ask that you review your files and consult with the HUD personnel with respect to how much of a study has already been done of that site and advise the court whether, in your opinion, further inspections or analysis are appropriate. Surely, in an agency of the size and with the resources of HUD, if such further analysis is required, it should be possible to assign personnel to that task without interfering with the review of the existing RFP. HUD surely has more than one project under consideration at a time.

But it may all be moot. My impression is that Austin was the subject of considerable scrutiny previously.

We will get everyone's comments with respect to Court Exhibit A by September 30th. I will schedule a conference or a hearing promptly thereafter. I like to schedule hearings as early as possible so people may make plans. I realize that we have out of town counsel in the case. But I think it is very difficult to estimate now how long after September 30th would be appropriate to do the study and review.

(12) Mr. Heffernan?

MR. HEFFERNAN: Your Honor, I have a fairly basic question here. Counsel for the city has represented that this specific, I suppose we would call it, request for modification has been put forward by the city, namely, the majority of the City Council. I would like to know in what form that city approval has come, whether or not there has been a vote of the City Council on this specific propose. If not, I think it would be appropriate to have a council vote. Quite frankly, your Honor, I think we have been down this road before where if we don't have a City Council action on something, I don't think we have the city position on something.

THE COURT: Mr. Sculnick?

MR. SCULNICK: First, the two additional resolutions forwarded to the court reflect what the city believes to be a concurrence of the majority of the City Council for these specific changes, five members. Plus, I think we are in a position to represent that on the basis of our informal discussions and as a result of the discussions and negotiations that led up to preparing just such a document to be submitted to the court.

THE COURT: You have the benefit, as neither I nor Mr. Heffernan have had, of having compared Court ExhibitA with the resolution. Are you saying that it is your view (13) that Court Exhibit A implements the resolution?

MR. SCULNICK: I am not in a position to say they are identical, but certainly their intent is to be the same.

MR. HEFFERNAN: It is my understanding that the resolution was a nonbinding resolution. I don't know that they are exact copies. The Justice Department does not have its head buried in the sand. Based upon what we have been learning for the past several days, I think there is a serious question about whether there is City Council support for this plan. I don't

think it is unreasonable to ask for a vote on this. Frankly, if we don't have the council support on this plan, I think we are wasting our time and the judge's time and the parties time in responding to this.

MR. SCULNICK: May I respond, your Honor? THE COURT: Yes.

MR. SCULNICK: Your Honor is well aware that we have been reluctant to represent to the court that we have the agreement of the City Council without a good-faith basis for so believing. I think having another vote at this point is really a pointless act.

THE COURT: Why is it pointless? When for the first time was the Austin site the subject of this resolution? When did that reenter the consideration of the housing remedy?

MR. SCULNICK: In this most recent episode, last (14) week Wednesday, your Honor, a week ago Wednesday. Of course, it has been a familiar site for quite some time. But in this particular episode, just a week ago.

THE COURT: It seems to me that there is a virtue in Mr. Heffernan's suggestion which is more than the mere question of authority, and that is the extent to which there is, in fact, support in this plan. I have been deluged with letters from Canopy and from Park Hill Residents Association and from other groups decrying what appears to be a reversion to the concept of higher density, which was something which had been considered and set aside in preference for the lower density seven-site scattered housing. I really did not want and do not want at this time to get into a discussion of the merits of the proposal. But Mr. Heffernan is certainly right that it would be unfortunate if all the time and effort and emotion was directed toward this proposed amendment only to learn that it, in fact, did not have the broad support which was envisioned when I made the statement that we would welcome changes to the plan which had the support of the community and the parties.

I recognize that any plan is going to have its detractors, and there are many who think that it is simply a matter of "not in my backyard." What is the problem, now with the benefit of Court Exhibit A, of having the City (15) Council adopt a reso-

lution urging modification of the consent decree to embody the order?

MR. SCULNICK: I would appreciate the opportunity first to discuss some of these items in chambers. But I think basically the city's concern is that every time a City Council meeting is held on one proposal or another, you are going to draw a lot of debate both pro and con which tends to derail the positive movement toward a resolution which will, if the court please, be positive.

THE COURT: Let me put it this way. Assume, solely for the point of argument, that as a result of the discussions and the comments the court and the parties, other than the City of Yonkers, agree to a second consent decree which is, in whole or in significant part, in conformity with Court Exhibit A. Are you prepared, on the basis of the existing City Council resolution, to sign such an amended consent decree on behalf of the City of Yonkers?

MR. SCULNICK: Your Honor, I think that type of a hypothetical brings the negotiation process into the media, into the public, in a way that makes it very difficult to answer that truthfully. I think that the city has presented these—

THE COURT: Let me make another suggestion. Let's go forward with our timetable, that is, comments in two weeks, the end of the month. Understand that the court (16) will not entertain any amendment to the consent decree proposed by the City of Yonkers unless and until it has assurance that that proposed amendment is supported by a majority of the City Council. Otherwise, I think you would agree, we are really just spinning wheels.

MR. HEFFERNAN: Your Honor, I don't quite understand what you just said.

THE COURT: What I am saying is that I adhere to my direction to the parties to consider and comment on this proposal and to submit their responses. But the court will not, when it has all those comments—and I hope that the comments will be exchanged not only in writing to the court but informally among the parties—but the court will not amend a consent decree to substitute another decree which is said to be a proposal

by the City of Yonkers unless it has the assurance that that is, in fact, the case, which assurance is best furnished by a City Council resolution.

MR. HEFFERNAN: Your Honor, if I can object. Basically, what you are doing is you are telling the United States and HUD and the other parties to comment on something that we have no real assurance is going to be passed on the City Council.

THE COURT: That is exactly what I am doing. That means that there is going to have to be an expenditure of some time and effort on everyone's part in the next two (17) weeks, and it may all come to naught. It may be that much of what has happened in the past two years will all come to naught. I think that is in the nature of the process.

MR. HEFFERNAN: Your Honor, I just think—

THE COURT: Frankly, I think that is not a very heavy burden.

MR. HEFFERNAN: I think it just ignores past history of what the City Council has done in this case. I don't understand why the city cannot commit itself to something it has put forth today as its proposal.

THE COURT: I am prepared—Mr. Sussman will remind me of my perpetual unjustified optimism—to proceed upon the assumption that the City of Yonkers has indeed learned what one city councilman is quoted as having said was a very expensive civics lesson.

Mr. Sussman?

MR. SUSSMAN: Briefly, I do want to respond to some of the questions your Honor raised now and not in chambers, because given that that I were raised here I think, frankly, I would have to respond to them today in some form, and I think the court should hear the response directly.

First of all, let me just say one thing prefatory to that. I think it needs to be said very directly. In our meeting of two Fridays ago with this court, held off the (18) record but it was transcribed, the court indicated that compliance had to occur but that the court might consider or would consider on the merits suggestions to, quote, improve or better, closed quote, the plan.

In my own judgment, and I believe the judgment of the board of the NAACP, what Court Exhibit A represents is a joint effort by the NAACP and the city to produce such an outcome. It is not meant in disrespect in any regard to the court. The city did comply first. It was my constant position in discussions that compliance would have to occur.

THE COURT: Let me interrupt you because in no way, in no way, do I regard any proposals to modify the existing plan as being disrespect for the court. There is no pride of authorship in the consent decree plan. There is particularly no pride of authorship in the consent decree plan because the court is not the author of that plan.

MR. SUSSMAN: I understand that. But I do think that, unfortunately, and I am not suggesting the court has created the impression, but I think it has been created that there are those who are saying that by trying to sketch out with the city in the period of last week what might constitute, quote unquote, improvements and what might be acceptable to us as, quote unquote, improvements before compliance, we were somehow compromising the integrity of the process. I just don't believe that because I think it (19) should be clear on the record that at every meeting at every stage I insisted there be compliance before any presentation be made. I want that to be made for the record in light of matters stated by others which I am frankly trying not to respond to each matter.

THE COURT: It was my understanding and it was confirmed in that 5 p.m. telephone conversation on September 8th that it was the position. NAACP said that there would first have to be compliance. I also, while we are on that subject and relevant to your remarks, know that there was reference made in the media to the court's having refused to hear the substance of the proposed modifications. I want to make it clear that I did that not because I was resistant or adverse to any changes in the plan that would be generally regarded as improvements but because I wanted it to be clear beyond anyone's possible doubt that compliance had to be unconditional.

MR. SUSSMAN: Correct. That was certainly made clear. Frankly, I think the timing of that call and the court's statement was extraordinarily helpful in producing the resolution of

that evening. But I also think important to the resolution was an understanding by all involved in Yonkers that the court had stated the Friday previous that improvements were possible, without of course sketching any improvements or discussing them in any detail.

What you have before you as Court Exhibit A, and I am not going to go through it and try to defend it here today another day for that may arise, I hope is an effort by the NAACP and the city to provide that set of improvements which we believe has social virtue as well as practical virtue. I do want to respond specifically to the questions that your Honor raised.

The first had to do with cost issues.

THE COURT: My eye has just fallen on the paragraph in which it says that the city agrees to pay the difference.

MR. SUSSMAN: Yes. That related, your Honor, to conversations which had occurred, and I am sure these are at this point a matter of record, with regard to total development costs that HUD had made available or would make available within its administrative discretion and the possibility that those might not suffice to cover all costs. The city, through this document, has agreed to assume the additional costs on those four free-standing sites.

I want to make one other point on costs because I think it is important. In the course of our discussions, and I am sure the court is aware of this, the State of New York, through the governor directly and his counsel directly, have said to us that that I are willing to provide state assistance with respect to the affordable housing to (21) be built in Yonkers. That I have made no specific commitment, I want to make that clear. But it is my understanding that the governor may have further information on this available.

What we are proposing on the two mixed sites, just so it is clear, is some number of units of public housing, some number of units of affordable housing, which would of course go toward realization, in an expeditious way in my judgment, of the affordable housing goals, and some larger number of market-rate housing. It is our contemplation that the affordable housing to be built on those two sites would be built with

the contribution of the city as set forth in the long-term ordinance and the long-term plans. In other words, the inducements and incentives would be part and parcel to that and part of that process in terms of cost issues. I just thought that I would inform the court of that since there may be confusion as to it.

Your Honor also asked the question about marketing and ownership and, I believe, the running of the units and how that would work. It is my understanding that the MHA may request from HUD a dispensation or permission which would allow it to, in fact, contract for management services with a not-for-profit and, in fact, jointly, in a sense, manage the projects. We would hope that that would (22) be attempted in this situation.

Let me respond to the issue with respect to the west side of Yonkers, which the court raised. First of all, it is not the City of Yonkers which is requesting, as is included in Court Exhibit A, a study of the management and the city contribution to extant west side housing; it is the NAACP. We believe it does have a place here for the following reason. We do not believe that we can assure east Yonkers residents of the optimal management of public housing at the same time that we allow in place management which is widely perceived, whether fairly or unfairly and that is why we want this study to be done and then a commission of Yonkers residents to review the study and implementation of its representations. We do not believe we can allow that 2400 units of housing to be managed in a way which does not provide equity vis-a-vis the housing in east Yonkers. We can't simply focus on the housing in a white neighborhood on ensuring proper management, while allowing the—

THE COURT: You mean equity in the sense of fairness?

MR. SUSSMAN: That is correct. We must have, if we are going to focus on the 200 units, some focus to the extent of equity on the exant management. The MHA obviously would have every opportunity, when a consultant is employed (23) and then the three-person commission nominated by Mr. DeLuca

THE COURT: No, my point was not in any way to disparage there being such a study. My point was simply that that was something, it seems to me, which was entirely within the power of the City of Yonkers to do and did not require the court's approval or the approval of any of the parties.

MR. SUSSMAN: I am trying to explain to the court why it is a little more complex than that. The reason it is more complex is that the management of the 200 units is clearly an issue this court will focus on if it has not already. To set up a management there, if one wants to look at it this way, which optimizes the management of the units, while we are aware of the conditions or the claimed conditions in the west side, creates a situation which appears and in fact would be inequitable. I think you can't simply look at one and say the other the city can do on its own. We would not see as enforceable some agreement with the city in this consent decree in exchange for having management discretion in east Yonkers but not west Yonkers. We think that I are linked. not just politically but in terms of the individuals living on both sides of the city. I suggest to the court that it is, but we can leave until another day whether that is important or not.

Now I want to talk about timing. In all of their (24) discussions, discussions with Mr. Pickelle and Mr. DeLuca, those that Mr. Sculnick was involved with, and those were the primary parties to these discussions, one matter was clear. I don't think anyone will deny this or contradict it. That was that we recognize the need for expedition. We recognize that there is an RFP review process that is supposed to be consummated by the end of this month, and that this process has gone on for too long, that this process is socially destructive, as it has been. Our hope, frankly, was that quite quickly we would have guidance from HUD—and we understand the integralness and importance of HUD's role and are not trying in any way to overrule it—on several issues. One, the useability of Austin Avenue, not simply for public housing residence, but of course in the fashion we are speaking of, since I think that might change the equation somewhat and it is obviously relevant, and of course a view from HUD as to whether the mix that we have

proposed at Whitman and Austin would be within their range of tolerance, if I can use that word.

On that mix, the final comment is this. There had been a consensus between the United States and the NAACP in this case in 1986 and 1987 on the Whitman site that we should go with some mixed use. It may not be identical mixed use to the one now proposed, but there was a clear consideration of that and a concern that we not use a huge (25) site, 18 acres, for 48 units of housing. I understand the density concerns that have been raised by Canopy and other well-meaning people. But in terms of social utility, in terms of producing housing in an efficient manner, that is a very large site, and we think density can be respected on a site of that size with an accommodation of the units that we have been proposing.

I think that proposal should not be seen as coming out of the left field but rather is consistent with a long line of thought in this case which, though ultimately not used, was really, in my judgment, not rejected for any principle reason. We welcome the court's willingness to review this plan with us. It is not set in concrete. There can be changes to it. It does not represent, as the Herald Statesman has editorialized, a rush job, but at least for me a culmination of many years of thinking about these issues, and it should not be regarded as something that was thrown together in five minutes.

THE COURT: Does anyone else wish to be heard? I will meet with the parties in chambers. But does anybody else wish to be heard in open court?

Mr. Dudley?

MR. DUDLEY: Your Honor, I have a couple of questions. One is, it seems to me, that Court Exhibit A is understandably, and I suppose necessarily at this point, a (26) sketch. I would assume that there is a lot of flesh that needs to be put on the bone that isn't here yet. I would like to inquire of the NAACP and the city, through the court, if I may, whether it is anticipated that this document is going to be made more specific so that other parties, including the school board, will have a better opportunity to comment meaningfully on it than it seems to me we do at this point.

For example, our interest, obviously, is in what happens at the Whitman site and what significance this has for the school board's interest in the utilization of the building at Whitman. There isn't any indication in this document, so far as I can see, as to what kind of a layout at Whitman is envisioned, what parcels at Whitman would be used, which would be preserved, what would happen with the building, and so on and so forth. That is one question in terms of process that I have.

My second question relates to the role of Mr. Newman and the cautionary remarks that your Honor made earlier this morning. We have in the past, I know I have in the past, from time to time tapped the expertise of the outside housing adviser. His views on sites have been helpful to me. That I have certainly been relevant. Frankly, to this point the school district has not retained a planning expert or a housing expert to assist it in an (27) independent analysis of proposals such as these. I guess I am looking for a little further guidance from the court as to what communications are permissible with Mr. Newman and which are not.

THE COURT: Direct your inquiries to the court. If that I are matters that fall within the areas of his expertise and I deem it appropriate, I will pass them.

MR. SUSSMAN: May I respond to the question?

THE COURT: Does that respond?

MR. DUDLEY: If I could get a response to my first question, it would be helpful, which was how to get more detail.

THE COURT: Further detail of this. I am wondering whether you want to respond to that now or whether you want to respond to that in conference.

MR. SUSSMAN: I think I should say something publicly to that.

Both with respect to the precise site at Austin Avenue, where Mr. Newman and perhaps your Honor will recall, there were two specific sites discussed, site D and site Q at specific points in time and with regard to the specific site at Austin and how the buildings could be used by all concerned, we purposely left those issues open. We felt, for example, that with regard to HUD, there are two specific sites at Austin. We have no particular view that one of (28) those sites rather than the other must

be used. Our view is that that I are two sites, that I both have advantages from our point of view, and perhaps disadvantages. We don't want to be wedded to one. We felt that was a process that we should be involved in with HUD. As your Honor intimated a short time ago, hopefully there will be informal contacts and we can get that straight.

Likewise with the school board. We would like to have contact with them to see if we can accommodate the social services needs, the recreation needs, the day care needs which the people will have and to accommodate the school board's needs. We don't see that as impossible.

MR. CURRAN: Maurice Curran for the school board. I now would like to mention to the court the September 2 order which is still in effect. This has to do with respect to the creation of the separate trust fund. I believe, your Honor, that the order should remain in effect until the matter is stabilized. The court stated clearly that there had been compliance. There seems to be no question about compliance. On the other hand, the court leaves open the question as to a possibility of resumption of fines. At the outset of the court's remarks—

THE COURT: No more than exists in any litigation. I am not predicting future contempt on the partof Yonkers. It is my devout wish that that not take place. (29) I don't think that one can talk about a permanent alteration in the fiscal management of the city because it was at one point in contempt.

MR. CURRAN: The board's position, your Honor, is that the court's order up to the present time has been implemented only to the extent of a bank account. The funds remain commingled and mixed. The board's position is that that I should remain so. The board's position is that the special account fund, to the extent it contains revenues, should be retained in that special account until released by the court back to the city.

THE COURT: How much money is now in the special account? I am not certain at what point we started splitting the checks.

MR. CURRAN: I believe it is approximately 200,000.

THE COURT: Is that what you are directing your remarks to, whether the $200,000 goes to the school board or back to the city?

MR. CURRAN: We are not saying it should go to the school board. There is only one fund and it should remain one fund. We believe the order should remain in effect with respect to the creation of a trust fund.

THE COURT: You mean in the event that there is a further contempt and further apayment of fines?

(30) MR. CURRAN: In the event that this present order is not stabilized.

MR. SUSSMAN: That has nothing to do with it.

THE COURT: When Yonkers was purged of contempt, as it has been, that order became inoperative. If we ever reach the unhappy state that there is again contempt, we know several things. We know that the fine level begins where it left off, that is, $819,000 or whatever it is for the first day and then the million, and then it caps at a million thereafter. We know that. I would certainly, if that happened,, unless there is a radical change in circumstances, reinstitute the arrangement between the school board and the city with respect to fines, and so on. I see no reason now why that should continue to be an operative order.

MR. CURRAN: The board of education agrees with the court. It is inoperative for all practical purposes at the present time. If the court, therefore, at this point right now decided the court order is no longer in effect, the board of education fully consents to that, your Honor, and requests that whatever funds are in the special account be returned to the city. This court made specific reference to the imposition of fines to the individual taxpayers—

THE COURT: Why don't you, together with counsel for the city, prepare an order which I can give to the (31) cashier.

MR. HEROLD: I on behalf of HUD I would like to say that we do object to going forward with this review. The court mentioned earlier that Yonkers had learned a very expensive civics lesson. But it is my understanding that if Yonkers fails to pass the necessary ordinances or resolutions to support this plan down the line, that would not be an act of contempt.

THE COURT: That is correct, it would not be an act of contempt, because if Yonkers doesn't pass it, it will never be embodied in a court order.

MR. DUDLEY: That is correct. So there is no penalty to Yonkers.

THE COURT: Yes. So HUD will have to expend time and effort in the next two weeks, as will the Department of Justice, as will all of us, and it may be a wasted effort. It is worth it.

We have a poor family awaiting a sentence, and moments spent awaiting sentence are very long moments indeed. I would like to adjourn and resume at about 11:45 in the robing room.

(Recess)

EXHIBIT R—Affidavit of Peter Chema Dated August 17, 1988.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

IN THE MATTER OF PETER CHEMA,

Appellant,

UNITED STATES OF AMERICA,

Appellee,

and

YONKERS BRANCH—NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Plaintiff-Intervenors,

against

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

Docket No.:
88-8074

AFFIDAVIT

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

Peter Chema deposes and says:

1. I am a city Councilman of the City of Yonkers, now representing the Second District on Yonkers West Side, where I was born and raised.

2. I was elected to my present office in an election held in November 1987. Thereafter, in votes taken by the City Council, I voted against City approval of the consent decree entered on January 28, 1988 and against City approval of the Long Term Plan Order entered on June 13, 1988.

3. This is my third term as a City Councilman, the first two occurring during the years 1980-1984. At that time, I represented Yonkers' First Ward (also on the West Side) which then contained most of the City's subsidized housing. I was elected as a Republican in an area which was overwhelmingly registered as Democrats by a margin of about 6:1.

4. I have always been an advocate of my constituents' right to live in decent housing. For example, during my first term as a Councilman, I travelled by bus to New York with my constituents and testified in court on their behalf in a civil suit. In my testimony, I described substandard housing conditions as I had seen them and from an engineering perspective, drawing upon my education and college degree as a civil engineer.

5. Many of these conditions continue to persist on the West Side. The district court's Long Term Plan does nothing to address those people left behind in substandard housing on the West Side.

6. Last night, the City Council voted on the Affordable Housing Ordinance. I voted because I believed and was advised that paragraph 6 of the district court's order of July 26th and this Court's interpretive letter dated August 10, 1988 required me to vote.

7. At last night's public City Council meeting many people from Yonkers gave their views. Overwhelmingly, they urged the City Council not to approve the legislation.

8. In casting my voice vote last night against the zoning ordinace, I said the following:

> I cast my vote in the exercise of my First Amendment right to freedom of speech and to vote. I also cast my vote as a representative of my constituents to give meaning to their First Amendment right to petition the government through their elected officials.
>
> I vote today because I have been ordered to do so. My conscience will not permit me to vote "Yes" because I have been ordered to do so.
>
> I do not act out of disrespect for the federal court, but out of respect for the Constitution which I believe is the supreme law of the land. I welcome the chance to present my position to the Court of Appeals this Wednesday.

9. I do not believe that it is in the public interest to continue weekly City Council meetings at which votes are taken under Court direction while this matter is under appellate review. Nonetheless, if this court grants a stay of the July 26th order, I will remain available day and night to attend a City Council meeting to reconsider the legislation when so requested by any

member of the Council. Finally, I consent to the issuance of a stay on such a condition.

PETER CHEMA

Sworn to before me this
17th day of August, 1988
Nancy L. Vincent
Notary Public, State of New York

No. 31-4787243
Qualified in New York County
Certificate Filed in New York County
Commission Expires Aug. 31, 1989